

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

ANTHON WAINE SMITH,

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 366 WDA 2012

Appeal from the Judgment of Sentence entered January 30, 2012
in the Court of Common Pleas of Allegheny County,
Criminal Division, at No(s): CP-02-CR-0011985-2009

BEFORE: BENDER, ALLEN, and MUSMANNO, JJ.

MEMORANDUM BY BENDER, J.:

Filed: March 12, 2013

Anthon Waine Smith appeals the judgment of sentence of 15 to 30 years in prison following his conviction of Murder of the Third Degree, Firearms Not To Be Carried Without a License, and Persons Not To Possess Firearms, 18 Pa.C.S. §§ 2502(c), 6106(a)(1), 6105(c)(1) (respectively). Smith contends that the Commonwealth failed to adduce legally sufficient evidence to sustain his murder conviction and failed to disprove his defense of self-defense. He asserts, in addition, that the verdict is opposed to the weight of the evidence. Upon review, we find Smith's claims of evidentiary weight and sufficiency without merit and his claim of self-defense waived. Accordingly, we affirm his judgment of sentence.

Smith's convictions arose from his fatal shooting of victim Terrance Branson on October 16, 2006, following which the case remained unresolved

pending an investigation of more than two years. Ultimately, on questioning by police, witnesses Nicole Gurske, Michele Mercuri, and Nicole Moore acknowledged the event and explained that they had not reported the shooting when it occurred for fear of retribution by Smith and so as not to be perceived as "snitches." The subsequent testimony revealed that the shooting occurred after the three women, along with Smith, drove to the Mount Washington section of Pittsburgh to buy marijuana. After making the purchase, the group departed in Moore's vehicle with Moore driving and Smith behind her in the back seat. As they drove down the street, Smith sighted a vehicle heading in their direction that he recognized belonged to Terrance Branson, a rival who had previously robbed him at gunpoint and forced him to strip naked in the middle of the street. As the other car approached, Smith indicated that he disliked Branson, pulled out a gun, leaned out the window of the car, and from a distance of about five feet, began firing at Branson as the two vehicles passed.

Branson's half-brother, Jonathon Liebro, was on the telephone with Branson at the time of the shooting and later reported that during the call, Branson ceased responding and Liebro heard children screaming in the background. Shortly thereafter, Smith, who was friends with Liebro, telephoned and said he had shot Branson, boasting that he "lit the whip up"

and "emptied the clip."¹ After the shooting, Nicole Moore pulled over, told Smith to get out of the car, and then departed with Mercuri and Gurske to go and smoke the marijuana they had bought. When investigators arrived at the scene of the shooting, they found Branson shot through the head, slumped over the wheel of his car, with bullet holes in the front windshield, driver's door, front passenger door, and the driver's side rear window frame. They also recovered four .380 caliber shell casings, two of which were positively matched to the gun Smith was known to carry.

As Smith had remained a fugitive, his case finally proceeded to trial on November 14, 2011. Smith waived his right to a jury and the case convened before the Honorable Anthony J. Mariani sitting as finder of fact. In its case in chief, the Commonwealth called the medical examiner, the investigating police officers, Jonathon Liebro, Nicole Moore, and Nicole Gurske. Smith called no witnesses and elected not to testify on his own behalf. Following two days of testimony, the court found Smith guilty of third degree murder and the indicated firearms offenses. The court then ordered a pre-sentence investigation and, upon receipt of the report, convened a hearing on sentencing. At the conclusion of the hearing, the Commonwealth requested a sentence of 20 to 40 years' incarceration for third degree murder to be

¹ Liebro explained during his testimony that the slang terms he used indicated that he had fired into Branson's car and exhausted the ammunition in his gun.

followed by consecutive sentences for the firearms violations. Nevertheless, the court declined the Commonwealth's suggestion and imposed the more limited sentence at issue here, of 15 to 30 years' imprisonment with concurrent terms for the remaining offenses. Smith entered an oral motion on the record at sentencing, challenging the weight of the evidence. The trial court denied that motion.

Smith now raises the following questions for our consideration:

- I. DID MR. SMITH ACT WITH THE REQUISITE MALICE, AND/OR CONSCIOUSLY DISREGARDED [sic] AN UNJUSTIFIED AND EXTREMELY HIGH RISK THAT HIS CONDUCT MIGHT CAUSE DEATH OR SERIOUS BODILY INJURY TO JUSTIFY A CONVICTION FOR THIRD DEGREE MURDER INSTEAD OF VOLUNTARY MANSLAUGHTER?
- II. DID THE COMMONWEALTH DISPROVE THE DEFENSE OF SELF-DEFENSE BEYOND A REASONABLE DOUBT?
- III. DID THE COURT ERR WHEN IT FOUND THAT THE VERDICT WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE ON THE CHARGES WHERE THE EVIDENCE PRESENTED WAS SO VAGUE AND TENUOUS THAT IT SHOULD SHOCK THE CONSCIOUS [sic] OF THE COURT?

Brief for Appellant at 5.

Smith's first claim challenges the legal sufficiency of the evidence to sustain his conviction of Murder of the Third Degree. As a general matter, our standard of review of sufficiency claims requires that we evaluate the record "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. Widmer*, 744 A.2d 745, 751 (Pa. 2000).

“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.” ***Commonwealth v. Brewer***, 876 A.2d 1029, 1032 (Pa. Super. 2005). Nevertheless, “the Commonwealth need not establish guilt to a mathematical certainty.” ***Id.***; ***see also Commonwealth v. Aguado***, 760 A.2d 1181, 1185 (Pa. Super. 2000) (“[T]he facts and circumstances established by the Commonwealth need not be absolutely incompatible with the defendant’s innocence.”). “[W]here no single bit of evidence will by itself conclusively establish guilt, the verdict will be sustained where the totality of the evidence supports the finding of guilt.” ***Commonwealth v. Thomas***, 561 A.2d 699, 704 (Pa. 1989).

Thus, our Courts have recognized that proof of guilt may be inferred entirely from evidence of circumstances that attended the commission of the crime. ***See Brewer***, 876 A.2d at 1032. “The fact that the evidence establishing a defendant’s participation in a crime is circumstantial does not preclude a conviction where the evidence coupled with the reasonable inferences drawn therefrom overcomes the presumption of innocence.” ***Id.*** (quoting ***Commonwealth v. Murphy***, 795 A.2d 1025, 1038-39 (Pa. Super. 2002)). Nevertheless, “[t]he requirement of the law [remains] that in order to warrant a conviction[,], the facts and circumstances proved must be of such character as to produce a moral certainty of the guilt of the accused beyond any reasonable doubt.” ***Commonwealth v. Bybel***, 611 A.2d 188,

189 (Pa. 1992) (quoting *Commonwealth v. New*, 47 A.2d 450, 455 (Pa. 1946)).

[E]vidence sufficient to implicate an accused in a crime must be something more than evidence showing remote connection between the accused and the crime, or evidence that merely raises a suspicion of guilty intention An accused is entitled to an acquittal if his guilt of the crime charged is not the only reasonable interpretation of which the facts adduced against him are susceptible. Guilt must be proved and not merely conjectured.

Id.

Smith was convicted, first and foremost, of Murder of the Third Degree, 18 Pa.C.S. § 2502(c). The Crimes Code defines third degree murder by reference to Murder of the First and Second Degrees, as follows:

§ 2502. Murder

(a) Murder of the first degree.—A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

(b) Murder of the second degree.—A criminal homicide constitutes murder of the second degree when it is committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony.

(c) Murder of the third degree.—All other kinds of murder shall be murder of the third degree. Murder of the third degree is a felony of the first degree.

18 Pa.C.S. § 2502(a)-(c). We have reasoned accordingly that “[t]o establish the offense of third degree murder, the Commonwealth need only prove beyond a reasonable doubt that the defendant killed an individual, with legal

malice[.]” ***Commonwealth v. Devine***, 26 A.3d 1139, 1146 (Pa. Super. 2011).

‘[Malice] consists either of an express intent to kill or inflict great bodily harm or of a “wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty” indicating an unjustified disregard for the probability of death or great bodily harm and an extreme indifference to the value of human life. ***Commonwealth v. Carroll***, 412 Pa. 525, 194 A.2d 911 (1963).’ ***Commonwealth v. Chermansky***, 430 Pa. 170, 175, 242 A.2d 237, 240-41 (1968). ‘The existence of legal malice may be inferred and found from the attending circumstances of the act resulting in the death.’

Commonwealth v. Gardner, 416 A.2d 1007, 1008 (Pa. Super. 1980) (some citations omitted). Accordingly, “[m]alice may be inferred from the use of a deadly weapon on a vital part of the victim’s body.” ***Commonwealth v. Truong***, 36 A.3d 592, 598 (Pa. Super. 2012) (*en banc*). ***See, e.g., Commonwealth v. Young***, 431 A.2d 230, 232 (1981) (holding evidence sufficient to prove malice element of third degree murder regardless of whether the gun discharged accidentally or the defendant intended only to scare the victim, where the defendant aimed a loaded gun at the victim and the gun discharged).

In support of his claim of evidentiary insufficiency, Smith asserts that the Commonwealth failed to establish the requisite malice because the prosecution’s own case revealed evidence of “provocation or self-defense.” Brief for Appellant at 12. Smith premises his contention on the prior history of the two men, noting that “Mr. Branson and [the defendant] were familiar

with each other[,] as prior to the shooting at issue . . . Mr. Branson, the deceased, robbed [the defendant] and ordered him to remove his clothing, thus leaving him naked in the street.” *Id.* at 14. Smith elaborates that:

In any event, Mr. Liebro testified that Mr. Branson was looking for [the defendant], presumably to do him harm. This put [Smith] in reasonable fear for his life as Mr. Branson had previously robbed [the defendant] and Mr. Branson was known to be involved in various criminal activities and carried a gun.

Id.

For its part, the Commonwealth responds that “[t]he mere fact that there are some inconsistencies in a witness’[s] testimony is not alone sufficient to destroy the Commonwealth’s case.” Brief for Appellee at 7 (quoting *Commonwealth v. Curry*, 465 A.2d 660, 662 (Pa. Super. 1983)). We agree. In point of fact, Smith’s claim of sufficiency attempts only to challenge evidentiary weight. The Commonwealth’s evidence establishes that Smith recognized the victim’s car and, as it approached, drew his firearm, leaned out the car window, and fired a hail of bullets. N.T., Non-Jury Trial, 11/14/11-11/16/11, at 114-115, 139, 143-44. He shot directly at the defendant and emptied the ammunition clip of his gun, hitting the car multiple times, and penetrating the victim’s skull. *Id.* at 53, 93, 99, 182-83, 187-93. A search of Branson’s car revealed only a cell phone and a bag of marijuana—and no evidence that Branson was armed. *Id.* at 95, 122-23, 144-45, 174-75. Indeed, the record offers no indication whatsoever that

Branson, by whom Smith alleges he was threatened, was even aware of Smith's presence.

These circumstances readily establish the legal malice element of third degree murder and undermine any suggestion that Smith acted under provocation or threat in shooting Branson. Indeed, Smith exploited the anonymity the situation offered, acting from the protected confines of someone else's vehicle, a fact that allowed him to remain a fugitive for over two years. He then ambushed the victim from the distance between the two vehicles on the street—barely five feet—and emptied his ammunition clip into the car, one of the bullets piercing the windshield. Branson was unarmed and the record offers no suggestion that he was even aware of Smith's presence. Such conduct is a hornbook example of "unjustified disregard for the probability of death" and "extreme indifference to the value of human life." *Gardner*, 416 A.2d at 1008. *See also Young*, 431 A.2d at 232 (holding evidence sufficient to prove malice element of third degree murder where defendant aimed loaded gun at victim and gun discharged). Accordingly, we find the evidence more than ample to satisfy the elements of Murder of the Third Degree.

In support of his second question, Smith asserts that the Commonwealth failed to disprove his defense of self-defense. Brief for Appellant at 12. However, upon review of the defendant's Rule 1925(b) Statement of Matters Complained of on Appeal, we note that Smith's counsel

did not include such a claim. Accordingly, it is not preserved for our review and will not be resolved on its merits. **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.”); **Commonwealth v. Hansley**, 24 A.3d 410, 415 (Pa. Super. 2011) (reaffirming that “issues not raised in a Rule 1925(b) statement will be deemed waived for review”).²

In support of his third question, Smith contends that the trial court’s verdict is opposed to the weight of the evidence and therefore should compel a new trial. Brief for Appellant at 15. Smith characterizes the evidence as “flimsy” and offers the cursory suggestion that “[t]he testimony of the Commonwealth’s witnesses was contradictory and revealed an ever changing story.” **Id.** at 30. Nevertheless, his argument is substantially devoid of analysis, consisting merely of an alternative narrative of events, portraying elements of the story in a light most favorable to the defendant. Given the limited scope and standard of appellate review of evidentiary weight claims, we find Smith’s assertion illusory.

The weight given to trial evidence is a choice for the factfinder. **Commonwealth v. Jarowecki**, 923 A.2d 425, 433 (Pa. Super. 2007). If the factfinder returns a guilty verdict, and if a criminal defendant then files a motion for a new trial on the basis that the verdict was against the weight of the evidence, a trial court is not to grant relief

² Even if we were able to address the merits of Smith’s self-defense claim, we would find it meritless for the reasons stated in our discussion of his legal sufficiency claim.

unless the verdict is so contrary to the evidence as to shock one's sense of justice. ***Commonwealth v. Cousar***, 593 Pa. 204, 223, 928 A.2d 1025, 1036 (2007).

Commonwealth v. West, 937 A.2d 516, 521 (Pa. Super. 2007). As an appellate court, our standard of review is more attenuated still, as we may adjudge only the trial court's exercise of discretion in entertaining the defendant's challenge:

When a trial court denies a weight-of-the-evidence motion, and when an appellant then appeals that ruling to this Court, our review is limited. It is important to understand we do not reach the underlying question of whether the verdict was, in fact, against the weight of the evidence. We do not decide how we would have ruled on the motion and then simply replace our own judgment for that of the trial court. Instead, this Court determines whether the trial court abused its discretion in reaching whatever decision it made on the motion, whether or not that decision is the one we might have made in the first instance.

Commonwealth v. Stays, 40 A.3d 160, 168 -169 (Pa. Super. 2012) (citations omitted).

Mindful of our standard of appellate review and its exceptionally narrow scope, we find no basis for relief. Smith's case was evaluated by a trial judge who was personally present at trial, on the basis of oral testimony adduced from eyewitnesses and documentary evidence in the form of forensic and ballistics reports. The court found the evidence sufficient to sustain the elements of the offense charged and deemed the witnesses credible. The cold transcript before us offers neither legal basis nor factual implication to suggest that we decree to the contrary. Consequently, we find no basis for relief on Smith's challenge to the weight of the evidence.

For the foregoing reasons, we affirm Smith's judgment of sentence.

Judgment of sentence **AFFIRMED**.