NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
THOMAS GENE DAVIS, JR.,	:	No. 618 WDA 2010
Appellant	:	

Appeal from the Judgment of Sentence, October 7, 2009,
in the Court of Common Pleas of Allegheny County
Criminal Division at No. CP-02-CR-0014030-2008

BEFORE: FORD ELLIOTT, P.J.E., BOWES AND DONOHUE, JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.: Filed: February 21, 2013

This is a direct appeal from the judgment of sentence entered on October 7, 2009, following appellant's conviction of first degree murder. We affirm.

Appellant was charged with criminal homicide in relation to the death of Leroy Hughes ("the victim"). On June 3, 2008, the victim was residing with his fiancé Geri Davis ("Geri"), and her six children at 1223 Evans Avenue in McKeesport, Allegheny County. (Notes of testimony, 6/30/09 at 143.) Although separated, appellant often stayed next door at 1221 Evans Avenue with his wife Charleese Davis ("Charleese") and their children. At approximately 6:00 P.M., there was an altercation outside of their homes between the children of the two families that led to the adults becoming involved.

Geri testified that on the night in question she and the victim were upstairs watching television when one of the children informed them that an older male was beating up her 10-year-old son. (***Id.*** at 147.) When she got outside, she saw a 17 or 18-year-old male, Devin Brown ("Devin") who lived next door and is appellant's cousin, yelling names at her son. Geri and Devin then got into a verbal dispute. When the victim arrived outside, the two men got into a slight scuffle lasting no more than a minute. (***Id.*** at 148-149.)

Devin left and Geri's neighbor, Charleese, approached and the two women had words. She then saw appellant come out of the house; Geri noted his demeanor was calm. The victim and appellant began talking and she related that neither raised his voice nor were they arguing. (***Id.*** at 151, 153.) Rather, the victim attempted to pacify appellant and calm the situation, telling appellant, "can't we squash this, these kids will fight today and play tomorrow." (***Id.*** at 152-153, 161-162.) Appellant responded by stating that it was going to be settled now, and Geri watched appellant go back into his residence where he retrieved a .45 caliber handgun. From his porch, armed with that weapon, appellant twice asked Geri if she loved the victim. (***Id.*** at 154.) When she answered that she did, appellant pulled out the gun and began shooting the victim who was standing in front of a van. (***Id.***)

Geri saw the first bullet strike the victim in the neck. (***Id.***) As the victim ran, appellant chased him and continued to fire shots. (***Id.*** at 155.) As Geri was pushing the children into the house and trying to call 9-1-1, appellant pointed a gun at her and ordered her to put the phone down. (***Id.***) She went into the house and watched appellant fire more shots at the victim and run back into the residence. Geri then ran to the victim as neighbors attempted to help. Paramedics and police soon arrived. Appellant fled the immediate scene as well as Pennsylvania, and was apprehended five months later on November 6, 2008 in Nashville, Tennessee during a traffic stop.

Geri's 15-year old son, Dariun Davis ("Dariun"), also testified and confirmed his mother's version of events. Dariun testified that after firing the first shot, appellant jumped from the porch, ran toward the victim as he was "backing up," and continued to fire shots. (***Id.*** at 181.) He also testified that at one point when his mother was on the phone, appellant turned the gun on them and instructed Geri to put down the phone. Once appellant stopped firing, Dariun watched as he ran down the street. Later, at the hospital, Dariun told detectives what had happened and identified appellant from a photo array.

A neighbor, Laura Johnson ("Johnson"), testified that she observed the victim attempting to calm appellant after the boys had been fighting. She stated that neither of the men was yelling; rather the victim was asking if

they could "squash this." (***Id.*** at 188-189.) Johnson then heard appellant, who was on his porch with Charleese, say that he was tired and "it's all them scream'n [sic]" as appellant went to the door where Charleese handed him a gun. (***Id.*** at 191.) Johnson also heard appellant ask Geri if she loved her husband and Geri responded "I love him very much." (***Id.***)

At this point, Johnson then alerted the victim that appellant had a gun. The victim turned to run but appellant shot him in the neck. (***Id.***) She watched the victim attempt to flee as appellant pursued him. Appellant shot him seven more times and again as he lay on the ground between two parked vehicles in front of the residences. Appellant loudly stated to all gathered that, "now you can see how a man dies[.]" (***Id.*** at 191-192.) Johnson also later identified appellant from a photo array. (***Id.*** at 194.)

The autopsy later determined that the victim had been shot eight times, the cause of death being multiple gunshot wounds to the abdomen and pelvis, and the massive internal trauma associated with those gunshot wounds. At the scene, the police recovered eight 45 caliber shell casings; three from the sidewalk and five from the roadway. Pursuant to a warrant, the police conducted a search of Charleese's residence and found a large-framed holster inside a black plastic bag. The parties stipulated that when appellant was arrested, he was in possession of a 45 caliber High Point firearm.

The firearm expert determined that all eight 45 caliber cartridge casings were discharged by the same firearm. A second firearm expert examined the eight cartridge casings recovered and two bullet jackets that were recovered from the victim's body and determined that a 45 caliber High Point pistol was used.

Nashville Police Officer Adam Shipley testified that he observed a vehicle run through a stop sign and initiated a traffic stop. (Notes of testimony, 7/1/09 at 237.) The male passenger, who appeared to be very nervous, provided him an Arizona driver's license in the name of Eric Jones. (***Id.*** at 240-241.) Upon entering this information on the computer, the officer discovered it was false. Appellant eventually told the officer he was wanted in Pittsburgh for a homicide he committed in June. (***Id.*** at 244-245.) After making this statement, the officer observed that appellant began sweating profusely and appeared to be having a panic attack. (***Id.*** at 245.) Appellant claimed to have taken Ecstasy and the officer called for an ambulance. (***Id.***)

The officer testified that as he completed paperwork, appellant inquired as to what his sentence may be in Pittsburgh. (***Id.*** at 247.) Appellant then began to discuss the June incident and claimed that he and the victim engaged in a verbal altercation, at which time the victim began walking toward his car. Appellant averred that he saw the victim retrieve a firearm from his car. (***Id.*** at 248.) Appellant alleged that the two men

struggled and appellant was able to gain control of the gun and "just started shooting," unaware of the number of times he fired since he "just blacked out." (***Id.*** at 248-249.) Appellant explained that he fled the area, hitchhiked across the country, and assumed the false identity of Eric Jones. (***Id.*** at 249.)

The defense presented the theory that appellant shot the victim in self-defense. Appellant's eleven-year-old daughter, Larea Lewis ("Larea"), testified that on the date in question, she observed an altercation outside of their homes between the children of the two families. She went into the house to get her father so he could stop the fighting.

Devin testified that he observed the neighbor children fighting as well. (***Id.*** at 287.) Devin explained that he picked up one of the boys who was fighting and placed him on the other side of the fence. (***Id.*** at 288.) Geri came outside and Devin tried to explain what was happening. (***Id.*** at 290-291.) The victim then came out, yelling and threatening to beat him up. (***Id.*** at 291-292.) Devin alleged that the victim then struck him on his shoulder and the two engaged in a brief struggle. (***Id.*** at 292.) The struggle lasted about two to three minutes and Devin noted that appellant had come outside and was talking to the victim. Devin turned to attend to a dog and then heard gunshots but could not see where the shots had come from as he was not wearing his glasses. (***Id.***)

Charleese testified that on the day in question she came outside after hearing kids screaming and saw her nephew fighting with the neighbor's son in the front yard. (***Id.*** at 300.) Charleese testified that all of the arguments ended at the time appellant came outside. (***Id.*** at 307.) Charleese testified that the victim approached appellant and grabbed him around his neck and was saying something to him. (***Id.*** at 308.) She did not see anything else that occurred as her back was to the men while she tried to get her dog.[1] (***Id.***) She heard multiple gunshots and immediately got the children into the house. Charleese denied ever seeing appellant fire a gun and claimed to have no knowledge as to who shot the victim. (***Id.*** at 309-310.) While Charleese was present during the search of the home, she did not recall that the police found a holster in a bag in her dining room; in fact, when shown a photograph of the inside of her residence, she claimed she did not recognize the area depicted therein. (***Id.*** at 315-316.)

Appellant testified at trial and claimed that he shot the victim in self-defense. Autopsy reports indicated that the victim was 6 feet 3 inches tall and weighed 344 pounds. Appellant was approximately 5 feet 8 inches and 140 pounds. (***Id.*** at 331-332.) Appellant claimed that it was complete chaos when he initially went outside. (***Id.*** at 329.) Appellant alleged that he was not the initial aggressor and that the victim advanced toward him

[1] Contrary to Devin's testimony, Charleese stated that Devin was wearing his glasses at the time. (***Id.*** at 311-312.)

first. Appellant testified that once on the porch, the victim "just comes over and grabs me." (***Id.*** at 331.) The victim told appellant that he was "about to get served" and that his wife would be next. (***Id.*** at 332, 346.) Appellant described that the victim was "aggressive . . . [h]e was dead serious." (***Id.*** at 332.) Appellant was "terrified" after this threat and broke free, running toward his porch. (***Id.*** at 332-333.)

Appellant observed that the victim was following him and he pulled out a gun that he always carried in his pocket.[2] (***Id.*** at 333.) He then saw what he thought was the handle of a handgun sticking out of the victim's waistband and he thought he saw the victim reaching for the handgun.[3] (***Id.***) At this point, he stated that he pointed his gun at the victim and began firing. Appellant also testified that he blacked out after he fired the initial shot; he testified everything was a "blur" and he remembers nothing until he realized he was walking on train tracks somewhere in West Virginia; he no longer had the gun and did not know what happened to it. (***Id.*** at 335.) Appellant eventually made his way to Florida.

Appellant alleged at the time of the traffic stop in Nashville, he was actually on his way back to Pittsburgh to turn himself in to the police.

[2] Appellant, who had no license to carry a firearm, explained that he always carried a gun because he had previously been shot. (***Id.*** at 333, 344.)

[3] Appellant testified that he had seen the victim with a gun a month before the current incident. (***Id.*** at 333.) He also testified that he and the victim had never had problems. (***Id.*** at 330, 342.)

Appellant claimed that he provided false identification because he did not want anyone to find out before he had an opportunity to see his family. He further claimed that he told the officer that he was on his way to Pittsburgh to surrender as he was a suspect in a homicide and denied asking the officer what his sentence might be. (***Id.*** at 337, 358.)

The jury found him guilty of first-degree murder. On October 7, 2009, the court imposed a mandatory term of life imprisonment. Appellant filed post-sentence motions, which were denied on March 15, 2010. (Docket #20.) Appellant filed a timely notice of appeal on April 14, 2010. On May 20, 2010, the trial court directed appellant to file a concise statement of errors complained of on appeal within 21 days pursuant to Pa.R.A.P., Rule 1925(b), 42 Pa.C.S.A. On January 19, 2011, appellant filed a petition for leave to file a Rule 1925(b) statement ***nunc pro tunc***. (Docket #25.) On this same date, appellant filed a motion for extension of time and a Rule 1925(b) statement. (Docket #26.) On January 26, 2011, the trial court granted appellant's petition to file a Rule 1925(b) statement ***nunc pro tunc***. (Docket #27.)

The following issue is presented for our review:

> Did the trial court err when it denied [appellant's] post-sentence motion challenging the sufficiency of the evidence presented to convict [appellant] of Murder in the First Degree, where evidence at trial demonstrated that [appellant] was acting under an unreasonable belief he was entitled to use deadly force to protect himself and his family, and/or where

> [appellant] was acting under a sudden and intense passion?

Appellant's brief at i.[4]

> In determining sufficiency of the evidence, the Court must review the evidence admitted at trial, along with any reasonable inferences that may be drawn from that evidence, in the light most favorable to the verdict winner. ***Commonwealth v. Kimbrough***, 872 A.2d 1244, 1248 (Pa.Super. 2005), ***appeal denied***, 585 Pa. 687, 887 A.2d 1240 (2005). A conviction will be upheld if after review we find that the jury could have found every element of the crime beyond a reasonable doubt. ***Commonwealth v. Bullick***, 830 A.2d 998, 1000 (Pa.Super. 2003). The court may not weigh the evidence or substitute its judgment for that of the fact-finder. ***Commonwealth v. DiStefano***, 782 A.2d 574, 582 (Pa.Super. 2001), ***appeal denied***, 569 Pa. 716, 806 A.2d 858 (2002). "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." ***Commonwealth v. Sheppard***, 837 A.2d 555, 557 (Pa.Super. 2003).

Commonwealth v. Judd, 897 A.2d 1224, 1233-1234 (Pa.Super. 2006), ***appeal denied***, 590 Pa. 675, 912 A.2d 1291 (2006).

In support of his claim regarding the sufficiency of evidence, appellant first contends that he acted in self-defense or in the mistaken belief of self-defense. Appellant relies solely on the testimony he provided at trial and contends that the evidence established that the victim, who was

[4] Three additional issues contained in his Rule 1925(b) statement have not been presented by appellant to our court in his brief, hence we deem them to have been abandoned.

significantly larger, was the initial aggressor and threatened that he was about to "get served." Appellant also posits that he mistakenly believed the victim was armed and reaching for the gun. (Appellant's brief at 12.) No relief is due.

> 'The elements of first-degree murder are that the defendant unlawfully killed a human being, the defendant killed with malice aforethought, and the killing was willful, deliberate, and premeditated.' ***Commonwealth v. Wesley***, 562 Pa. 7, 753 A.2d 204, 208 (2000); ***Commonwealth v. Cox***, 556 Pa. 368, 728 A.2d 923, 929 (1999), ***cert. denied***, 533 U.S. 904, 121 S.Ct. 2246, 150 L.Ed.2d 233 (2001); ***see also*** 18 Pa.C.S. § 2502(a) and (d). The willful, deliberate, and premeditated intent to kill is the element that distinguishes first-degree murder from other degrees of murder. ***Commonwealth v. Wilson***, 543 Pa. 429, 672 A.2d 293, 297 (1996), ***cert. denied***, 519 U.S. 951, 117 S.Ct. 364, 136 L.Ed.2d 255 (1996). '[T]he Commonwealth can prove the specific intent to kill through circumstantial evidence.' ***Weiss***, 776 A.2d at 963. 'The use of a deadly weapon on a vital part of the victim's body may constitute circumstantial evidence of a specific intent to kill.' ***Id.***; ***Commonwealth v. Bond***, 539 Pa. 299, 652 A.2d 308, 311 (1995).

Commonwealth v. Drumheller, 570 Pa. 117, 141-142, 808 A.2d 893, 908 (2002), ***cert. denied***, 539 U.S. 919 (2003).

"Malice has been defined as a 'wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured.'" ***Commonwealth v. Miller***, 634 A.2d 614, 617 (Pa.Super. 1993) (***en banc***), ***appeal denied***, 538 Pa. 622, 646 A.2d 1177 (1994), citing

Commonwealth v. Pigg, 571 A.2d 438, 441 (Pa.Super. 1990), ***appeal denied***, 525 Pa. 644, 581 A.2d 571, quoting ***Commonwealth v. Drum***, 58 Pa. 9, 15 (1868). "[M]alice imports the absence of justification." ***Id.*** (citations omitted).

In ***Commonwealth v. Truong***, 36 A.3d 592 (Pa.Super. 2012) (***en banc***), ***appeal denied***, ___ A.3d ___ (2012), this court explained the principles of imperfect self-defense.

> A defense of "imperfect self-defense" exists where the defendant actually, but unreasonably, believed that deadly force was necessary. 18 Pa.C.S.A. § 2503(b); ***Commonwealth v. Marks***, 704 A.2d 1095, 1100 (Pa.Super. 1997), ***appeal denied***, 555 Pa. 687, 722 A.2d 1056 (1998). However, all other principles of self-defense must still be met in order to establish this defense. ***Commonwealth v. Broaster***, 863 A.2d 588, 596 (Pa.Super. 2004). The requirements of self-defense are statutory: "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." 18 Pa.C.S.A. § 505(a). If "the defender did not reasonably believe deadly force was necessary[,] he provoked the incident, or he could retreat with safety, then his use of deadly force in self-defense was not justifiable." ***Commonwealth v. Fowlin***, 551 Pa. 414, 421, 710 A.2d 1130, 1134 (1998). A successful claim of imperfect self-defense reduces murder to voluntary manslaughter. ***Commonwealth v. Tilley***, 528 Pa. 125, 141-142, 595 A.2d 575, 582 (1991).

Id. at 599.

Viewing the evidence in the light most favorable to the Commonwealth as verdict winner, as we must, we find that the Commonwealth disproved appellant's claim of self-defense beyond a reasonable doubt. The evidence easily supports a finding that appellant neither reasonably nor actually believed that deadly force was necessary. While the jury was free to believe appellant's testimony relating to self-defense, ***i.e.***, that he reasonably believed the victim was about to draw a weapon and was going to kill him, the jury did not do so here. ***See Commonwealth v. Bracey***, 541 Pa. 322, 332, 662 A.2d 1062, 1066 (1995) (holding that "the jury was free to disbelieve the evidence proffered by Appellant in support of claim of reduced intent and/or self-defense"); ***Commonwealth v. Carbone***, 524 Pa. 551, 562, 574 A.2d 584, 589 (1990) (providing that "[a]lthough the Commonwealth is required to disprove a claim of self-defense arising from any source beyond a reasonable doubt, a jury is not required to believe the testimony of the defendant who raises the claim").

The only evidence offered that related to self-defense was appellant's own testimony. Moreover, the jury heard two different versions of events as to what appellant claimed had occurred; the version he told police upon his arrest in Nashville and the version he testified to during trial. In both versions, appellant averred the victim had a weapon, however, there was no evidence that a gun was found anywhere near the victim, contradicting appellant's allegation.

When viewed in the proper light, the evidence established that appellant could not have a reasonable belief that he was in immediate danger of death or serious bodily injury. The evidence demonstrates that appellant was the aggressor in using deadly force. The victim's wife, his son, and Johnson all testified that appellant pulled out a gun and shot the victim, with two of these witnesses observing the first bullet hit the victim in the neck. These witnesses then observed the victim running away with appellant chasing after him continuing to fire shots. As appellant has no recollection after he fired the first shot, this testimony remains undisputed. The Commonwealth established that the victim suffered eight gunshot wounds. The fact that appellant chased the victim rather than retreated and that he continued to fire his weapon after the victim tried to retreat necessarily defeats any claim of self-defense. ***See Truong***, ***supra*** at 599 (where defendant stabbed victim 19 times in front and back of torso, he used more force than necessary to protect himself, thus negating self-defense claim).

Additionally, although appellant claimed he was acting in self-defense, he did not remain at the scene to explain what had occurred to the police. Instead, he fled the Commonwealth of Pennsylvania. Five months later when he was arrested in Nashville, he continued to try to conceal his identity. A fact finder can consider flight and concealment circumstantial evidence of consciousness of guilt. ***Id.*** at 600.

Again, in exercising its role as evaluator of credibility, the jury chose to discredit appellant's version of events. ***See Commonwealth v. Rivera***, 603 Pa. 340, 357, 983 A.2d 1211, 1222 (2009), ***cert. denied***, ___ U.S. ___, 130 S.Ct. 3282 (2010) (jury is free to discredit evidence offered by defendant related to self-defense). We find that the evidence presented was sufficient to allow the jury to conclude that appellant acted in an intentional and premeditated manner sufficient to sustain his first degree murder conviction.

Appellant also contends that he acted under serious provocation, and therefore, should only have been convicted of voluntary manslaughter. The test for a heat of passion defense used to reduce the degree of the offense is "whether a reasonable man, confronted with the same series of events would become impassioned to the extent that his mind would be incapable of cool reflection." ***Commonwealth v. Rivers***, 557 A.2d 5, 9 (Pa.Super. 1989). Further, if sufficient provocation exists, the fact-finder must determine whether the defendant actually acted in the heat of passion. ***Id.*** "To reduce an intentional blow, stroke, or wounding resulting in death to voluntary manslaughter, there must be sufficient cause of provocation and a state of rage or passion without time to cool, placing the [defendant] beyond the control of his reason, and suddenly impelling him to the deed. If any of these be wanting--if there be provocation without passion, or passion without a sufficient cause of provocation, or there be time to cool, and

reason has resumed its sway, the killing will be murder." ***Commonwealth v. Miller***, 605 Pa. 1, 23, 987 A.2d 638, 651 (2009), quoting ***Commonwealth v. Barnosky***, 436 Pa. 59, ___, 258 A.2d 512, 515 (1969).

Again, other than appellant's testimony, there was no evidence that the victim seriously provoked appellant. The initial altercation between the boys as well as the altercation between the victim and appellant's cousin had both ended by the time appellant arrived outside. Appellant concurred that there was no history of problems between the two men. Testimony of several witnesses established that appellant and the victim were merely talking to each other before the shooting. In reaching its conclusion, the jury obviously chose to disbelieve the statements regarding provocation, and determined that what, if anything, incited appellant was not adequate provocation, or concluded that appellant was not acting in the heat of passion when he killed the victim.

Judgment of sentence affirmed.