2012 PA Super 99

COMMONWEALTH OF PENNSYLVANIA Appellee v. CURTIS ALLEE WILLIAMS, JR. Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 933 MDA 2011

Appeal from the Judgment of Sentence May 16, 2011
In the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-CR-0002330-2009

BEFORE: GANTMAN, J., ALLEN, J., and MUNDY, J.

OPINION BY GANTMAN, J.: Filed: May 8, 2012

Appellant, Curtis Allee Williams, Jr., appeals from the judgment of sentence entered in the Dauphin County Court of Common Pleas, following his jury trial convictions for aggravated assault and recklessly endangering another person ("REAP").[1] Appellant now challenges the court's decision to exclude evidence of the victim's blood alcohol content, as well as the court's use of the phrase "victim." We hold that a defendant's after-acquired knowledge of the victim's intoxication is not relevant to a claim of self-defense. We further hold the trial court properly denied Appellant's motion *in limine* to preclude the use of the term "victim" at trial because the phrase

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[1] 18 Pa.C.S.A. §§ 2702(a)(1) and 2705, respectively.

"victim" was not unduly prejudicial, given the circumstances of this case. Accordingly, we affirm.

The relevant facts and procedural history of this appeal are as follows. This case involves an incident of aggressive driving that escalated into a roadside shooting. On April 12, 2009, Appellant was driving down Nyes Road in Harrisburg after having dinner with his family; Harrison Purdy was in a sports utility vehicle directly behind Appellant. Appellant believed Mr. Purdy was going too fast and following too close, so Appellant slammed on his breaks to alert Mr. Purdy. Mr. Purdy took exception, and the situation intensified to the point where both men were driving aggressively and in a hostile manner toward each other. While stopped at a red light, Mr. Purdy exited his car and approached Appellant's vehicle. Appellant also left his car, but with a gun. He pointed the gun at Mr. Purdy and fired three shots; one shot hit Mr. Purdy in the leg. Mr. Purdy was rushed to the hospital, where doctors treated him for the gunshot wound. Routine tests performed at the hospital revealed Mr. Purdy had a blood alcohol content ("BAC") of 0.156.

Police charged Appellant with criminal attempt homicide, aggravated assault, and REAP. Both parties filed motions *in limine* seeking evidentiary rulings from the court. The Commonwealth sought to preclude Appellant from introducing Mr. Purdy's BAC results at trial. Appellant tried to prevent the Commonwealth or the court from using what Appellant referred to as "loaded language," such as "victim" and "crime scene" at trial. On

December 3, 2010, the trial court granted the Commonwealth's motion and denied Appellant's motion. The case went before a jury on March 7, 2011, where Appellant raised a claim of self-defense. The jury heard two days of testimony before finding Appellant guilty of aggravated assault and REAP, but not guilty of criminal attempt homicide. On May 16, 2011, the trial court imposed an aggregate sentence of five (5) to ten (10) years' imprisonment. Appellant timely filed a notice of appeal on May 25, 2011. The court ordered Appellant to file a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b), and Appellant timely complied on June 22, 2011.

Appellant raises the following issues for our review:

> RELEVANT EVIDENCE IS ADMISSIBLE UNLESS OTHERWISE PRECLUDED BY LAW. HARRISON PURDY WAS INTOXICATED AND WAS MAKING AGGRESSIVE GESTURES WHEN HE APPROACHED [APPELLANT] AND HIS JUVENILE CHILDREN. WAS EVIDENCE THAT MR. PURDY WAS INTOXICATED ADMISSIBLE WHERE [APPELLANT] CLAIMED SELF-DEFENSE IN SHOOTING MR. PURDY?
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> THE DICTIONARY DEFINITION OF THE WORD "VICTIM" IS "ONE HARMED BY A CRIME OR WRONG." THE QUESTION AT ISSUE IN THE PRESENT CASE IS WHETHER MR. PURDY WAS INJURED BY A CRIME OR WRONG. WAS THE TRIAL COURT'S DECISION TO CALL MR. PURDY THE VICTIM ON AT LEAST 17 OCCASIONS ERROR, FOLLOWING ITS DENIAL OF [APPELLANT'S] MOTION *IN LIMINE* TO PRECLUDE SUCH LANGUAGE?

(Appellant's Brief at 1).

Appellant argues evidence of Mr. Purdy's BAC results was relevant to Appellant's claim of self-defense because it would aid in the jury's

determination of whether Appellant reasonably believed that force was immediately necessary to protect himself and his children. Appellant maintains the court's decision to preclude the BAC evidence denied Appellant the opportunity to present expert testimony on the link between alcohol and violent tendencies. Appellant also argues the BAC evidence was relevant to show bias, where Mr. Purdy had a BAC over the legal limit, but the Commonwealth did not charge him with DUI. Appellant seizes on this fact to claim the Commonwealth gave Mr. Purdy "preferential treatment," which in turn supplied Mr. Purdy with a motive to testify in a manner consistent with the Commonwealth's theory of the case. Appellant further contends that Mr. Purdy's high BAC was relevant to impeach his perception of the events in question. For these reasons, Appellant concludes the court erred in precluding the admission of Mr. Purdy's BAC results at trial. We disagree.

"A motion in *limine* is a procedure for obtaining a ruling on the admissibility of evidence prior to or during trial, but before the evidence has been offered." ***Commonwealth v. Bobin***, 916 A.2d 1164, 1166 (Pa.Super. 2007). A trial court's decision to grant or deny a motion *in limine* is generally subject to an evidentiary abuse of discretion standard of review. ***Commonwealth v. Moser***, 999 A.2d 602, 605 (Pa.Super. 2010), *appeal denied*, ___ Pa. ___, 20 A.3d 485 (2011).

Relevance is the threshold for admissibility of evidence. ***Commonwealth v. Cook***, 597 Pa. 572, 602, 952 A.2d 594, 612 (2008).

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pa.R.E. 401. "Evidence is relevant if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable or supports a reasonable inference or presumption regarding a material fact." ***Commonwealth v. Drumheller***, 570 Pa. 117, 135, 808 A.2d 893, 904 (2002), *cert. denied*, 539 U.S. 919, 123 S.Ct. 2284, 156 L.Ed.2d 137 (2003). "Evidence that is not relevant is not admissible." Pa.R.E. 402. "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Pa.R.E. 403. "Evidence will not be prohibited merely because it is harmful to the defendant." ***Commonwealth v. Page***, 965 A.2d 1212, 1220 (Pa.Super. 2009).

Pennsylvania Rule of Evidence 404 in relevant part provides:

> **Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes**
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> **(a) Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
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> * * *
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> (2) Character of alleged victim.

> (i) In a criminal case, subject to limitations imposed by statute, evidence of a pertinent trait of character of the alleged victim is admissible when offered by the accused, or by the prosecution to rebut the same.
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> (ii) In a homicide case, where the accused has offered evidence that the deceased was the first aggressor, evidence of a character trait of the deceased for peacefulness is admissible when offered by the prosecution to rebut the same.
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> * * *

Pa.R.E. 404(a)(2).

In a homicide trial, a defendant claiming self-defense may introduce evidence of the victim's violent character to show the defendant reasonably believed his life was in danger. ***Commonwealth v. Dillon***, 528 Pa. 417, 420, 598 A.2d 963, 964-65 (1991). Where this character evidence is offered to support the defendant's state of mind, the defendant must show he had knowledge of the victim's character trait or reputation as proper foundation for the claim that his knowledge reasonably put him in fear of the victim. ***Id.*** at 421, 598 A.2d at 965. Furthermore, "being under the influence of drugs is not necessarily violent conduct" or raise the presumption of a greater propensity for violence. ***Commonwealth v. Yanoff***, 690 A.2d 260, 265 (Pa.Super. 1997), *appeal denied*, 548 Pa. 681, 699 A.2d 735 (1997). The mere fact that a person is behaving in a manner consistent with someone who is under the influence does not automatically lead to the conclusion that the person is more likely to be violent, absent knowledge

and evidence of the person's prior violent conduct under similar circumstances. ***Id.***

Instantly, evidence of Mr. Purdy's BAC results was not relevant to Appellant's self-defense claim for several reasons. To the extent Mr. Purdy's intoxication might affect Appellant's reasonable belief that he was entitled to defend himself, there is no evidence Appellant knew Mr. Purdy was drunk when the shooting occurred. ***See Dillon, supra***. Rather, not until after the shooting did the hospital tests reveal Mr. Purdy was legally intoxicated. Appellant's lack of knowledge of Mr. Purdy's condition when Appellant shot him undermined any probative value the BAC results had with respect to Appellant's claim of self-defense. In other words, the circumstances presented to Appellant at the time of the shooting did not include Mr. Purdy's condition or BAC results; therefore, neither was a factor in Appellant's decision to shoot or relevant to Appellant's claim of self-defense. ***See id.*** Moreover, the potential prejudicial impact of this evidence was substantial. Drunk driving carries such negative societal perceptions, it could likely inflame the jury and lead to a decision on an improper basis. ***See*** Pa.R.E. 403 (stating: "Although relevant, evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). As

a result, the court correctly excluded evidence of Mr. Purdy's BAC as both irrelevant to Appellant's self-defense claim and unduly prejudicial.

To the extent Appellant sought to introduce Mr. Purdy's BAC results as character evidence under Pa.R.E. 404(a)(2), his claim is equally unavailing. As an initial matter, Appellant had no knowledge that Mr. Purdy was intoxicated when Appellant shot him, or that Mr. Purdy became violent when intoxicated. Hence, Appellant had no foundation to introduce evidence of Mr. Purdy's BAC results as character evidence. ***See*** Pa.R.E. 404(a)(2) (requiring character trait to be "pertinent"). Moreover, intoxication does not necessarily lead to violent conduct such that intoxication can be automatically generalized as "admissible character evidence" in all cases. ***See Yanoff, supra*** (rejecting link between intoxication as result of drug use and violence, absent evidence defendant knew person in question became violent if under influence of drugs). As in ***Yanoff***, Mr. Purdy's BAC results alone did not show he had any propensity for violence. Without evidence that Appellant knew Mr. Purdy became violent when he drank, his BAC was not admissible at trial as proper character evidence.

Appellant also fails in his attempt to assert the right to use the BAC results as evidence of Mr. Purdy's bias because evidence of bias was still subject to balancing per Pa.R.E. 403. ***See Commonwealth v. Rouse***, 782 A.2d 1041, 1045 (Pa.Super. 2001) (observing bias evidence can be excluded under Rule 403 if there is danger of unfair prejudice that outweighs its

probative value). Examination of the probative value and the prejudicial effect of Mr. Purdy's BAC results demonstrate why the trial court correctly excluded this evidence. On the probative side, the value of the BAC results as bias evidence is mitigated by the circumstances of this case. Mr. Purdy's bias was already manifest and stemmed mainly from the fact that he had been involved in a heated roadside argument with Appellant which ended when Appellant shot Mr. Purdy in the leg. Appellant had ample opportunity to explore Mr. Purdy's obvious bias, and did in fact do so. On the prejudice side, at the time of the shooting, Appellant did not know about Mr. Purdy's condition, which was after-acquired knowledge for Appellant. To admit the BAC results in this particular context could easily have suggested a verdict on an improper basis or distracted the jury from its duty to weigh the evidence impartially, given the social stigma associated with drunk driving. Therefore, Appellant's proposal to use Mr. Purdy's BAC results as bias evidence failed the balancing test and was subject to exclusion, even if it was somewhat relevant. ***See*** Pa.R.E. 403 and *Comment*.

Likewise, Appellant could not introduce evidence of Mr. Purdy's BAC results to challenge Mr. Purdy's perception or memory of the events in question. In their respective testimony, Appellant and Mr. Purdy disagreed on exactly **how far** Mr. Purdy had proceeded toward Appellant's car before the shooting occurred, but for the most part both men gave substantially

similar accounts of the events immediately preceding the shooting.[2] To the extent Mr. Purdy's intoxication at the time of the events in question might be relevant to question his perception as it pertains to his recollection, its prejudicial effect substantially outweighed its probative value.[3] Appellant sought to introduce evidence of Mr. Purdy's BAC primarily to support Appellant's contention that Mr. Purdy was "acting crazy" and had threatened Appellant in such a significant way to put Appellant in reasonable fear for his

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[2] The recently enacted "stand your ground" law is irrelevant here. The narrow issues before us deal with the admissibility of intoxication evidence to prove a claim of self-defense and have nothing to do with the policy and legislative concerns over a person's duty to retreat. As the dissent recognizes, "stand your ground" was not in effect at the time of the shooting in this case and has no impact on our disposition. Moreover, the jury's verdict shows it rejected Appellant's basic premise that deadly force was justified in this case.

[3] ***Commonwealth v. Boich***, 982 A.2d 102 (Pa.Super. 2009) (*en banc*) does not alter our conclusion here. ***Boich*** addressed an entirely separate issue—whether a rape victim who had been drinking on the night of her assault and had some trouble remembering details of that offense could be subjected to an involuntary psychiatric examination for the purpose of determining her competency to testify. This Court reversed the trial court's order compelling the involuntary psychiatric examination of the complainant, holding her inability to recall certain facts about the alleged incident was an issue for the finder of fact. Our comments in ***Boich*** regarding intoxication evidence served to illustrate our ultimate holding that although intoxication may impact credibility, it alone cannot serve as a basis to order an involuntary psychiatric examination to challenge a witness' competency. ***Boich*** does not have the sweeping effect the dissent seems to import—that intoxication evidence is at all times admissible to impeach credibility. Nothing in ***Boich*** altered the well-established rule that all matters of relevance remain subject to the balancing test of Rule 403. ***See Commonwealth v. Rouse***, 782 A.2d 1041, 1046 (Pa.Super. 2001) (holding evidence relevant to impeach may be excluded if probative value is outweighed by danger of unfair prejudice).

life. We have already concluded the BAC evidence was inadmissible on this basis. Appellant's alternative attempt to offer Mr. Purdy's BAC results for a narrow purpose—to impeach Mr. Purdy's recollection of the incident—would put otherwise inadmissible evidence in front of the jury for a very limited form of impeachment. Evidence that Mr. Purdy had been intoxicated at the time of the shooting would doubtlessly raise a substantial risk the jury might reach a verdict based on extraneous and generalized inferences regarding drunk driving and intoxication. ***See Commonwealth v. Green***, 434 A.2d 137, 141 (Pa.Super. 1981) (stating party may not use impeachment as pretext to place prejudicial evidence before jury). For this reason, evidence of Mr. Purdy's intoxication, as it bears on his ability to testify accurately about the shooting, is minimally probative while highly prejudicial.[4]

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[4] There is a distinct difference between using intoxication evidence to substantiate Appellant's self-defense claim and using it to impeach Mr. Purdy's recollection of the event. The dissent states Mr. Purdy's intoxication is an appropriate way to substantiate Appellant's claim that Mr. Purdy was "acting crazy." That position, however, goes directly to Appellant's self-defense claim, not to Mr. Purdy's recollection. ***See id.*** To admit the BAC results would serve only to support Appellant's asserted reasonable belief that he needed to use deadly force to defend himself. Evidence of Mr. Purdy's intoxication to impeach his recollection of the incident had no other real probative value. Further, even if Mr. Purdy had been "acting crazy," nothing of record justified Appellant's escalation of force by shooting Mr. Purdy with a gun. This is precisely why the intoxication evidence was rejected as unduly prejudicial and properly excluded.

More importantly, this was not a case that turned solely on Mr. Purdy's credibility or the jury was presented with two entirely conflicting versions of events and the only evidence the jury had was one of two disparate versions

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Therefore, the court acted well within its discretion when it excluded this evidence under Rule 403.

In his second issue, Appellant argues the trial court presupposed a crime had been committed when it referred to Mr. Purdy as "the victim" at trial. Appellant maintains use of the phrase "the victim" in reference to Mr. Mr. Purdy was inflammatory and unduly prejudicial because it suggested to the jury that the court believed Appellant was guilty. In Appellant's view, the court abandoned its position of neutrality and impermissibly rendered an opinion on the merits of the case, one that was highly likely to influence the jury's perception of the evidence. Appellant claims the court's decision to use the phrase "victim" was especially prejudicial in this case because Appellant was presenting a justification defense that disputed whether a

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(*i.e.*, this case was not a "he said/he said" case). The central issue here for Appellant was his self-defense claim—whether he had a reasonable belief that he was in danger of death or serious bodily injury to justify his use of deadly force against Mr. Purdy. Mr. Purdy's recollection had little bearing on Appellant's state of mind as it related to his self-defense claim. Thus, the dissent's analysis on this point is flawed.

Significantly, any error in this regard would qualify as harmless and not warrant a new trial, as the dissent suggests. Other testimony in this case adequately challenged Mr. Purdy's recollection of the incident. An eyewitness—Michael Cahill—called into question Mr. Purdy's account of certain parts of the shooting, when Mr. Cahill testified Mr. Purdy reached the driver's side of Appellant's car before Appellant shot him. To the extent Appellant wished to contradict Mr. Purdy's claim that he ventured no farther than the hood of his own car before he was shot, Mr. Cahill's testimony accomplished that purpose and served as unbiased evidence to **support** Appellant's version of events on this point.

crime had even been committed. Appellant concludes the court's decision was an abuse of discretion, undermined Appellant's presumption of innocence, and substantially affected his ability to receive a fair trial.[5] We disagree.

A trial court's use of language such as "victim" is not reversible error unless the contested language unduly prejudiced the defendant. ***Commonwealth v. Parente,*** 440 A.2d 549, 555 (Pa.Super. 1982) (holding trial court's use of word "victim" during trial was not so prejudicial to defendant as to warrant new trial). Any prejudice that might arise from the use of "victim" language is insignificant when the court gives jury instructions on the defendant's presumption of innocence, the Commonwealth's burden of proof, and the court's general role as impartial arbitrator. ***Id.***

In the present case, the factual record undercuts much of Appellant's argument in this regard. The certified record makes clear the court largely referred to Mr. Purdy as "Harrison Purdy," "Purdy," or "Mr. Purdy." Appellant's claim is also disingenuous, because the court's use of the word

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[5] The trial court said it was unable to review Appellant's second issue in full because he had failed to provide citations to the record where the court used the claimed "loaded language" like "the victim." Citations to the record are so essential to appellate review that they are required by rule, and an appellant's failure to include them could result in waiver. Nevertheless, we decline to deem the issue waived. Due to our disposition, we deny Appellant's application for remand to amend the Rule 1925(b) statement.

"victim" was often in the form of the phrase "potential victim" or "alleged victim." (***See*** N.T. Trial, 3/9/11, at 395-96). Therefore, a review of the record is sufficient to conclude the court's use of the term "victim" did not unduly prejudice Appellant. Moreover, the trial court in this case instructed the jury on Appellant's presumption of innocence, the Commonwealth's burden of proof, and the court's position of neutrality. ***See Parente, supra***. The court's instructions told the jury that it was the ultimate arbiter of factual issues, and the charges against Appellant were just allegations. Given those instructions, any use of the language at issue did not warrant a new trial.

In addition, the word "victim" does not carry the inflammatory impact Appellant suggests, as the term commonly applies equally to anyone who suffered from either an intentional **or** an accidental injury. Further, reference to Mr. Purdy as "victim" did not presuppose Appellant was at fault in this case; it merely connoted Mr. Purdy suffered an injury during the roadside altercation with Appellant, which was uncontested. Therefore, the court acted within its discretion when it denied Appellant's motion *in limine* to preclude use of the term "victim" at trial.

Based upon the foregoing, we hold that a defendant's after-acquired knowledge of the victim's intoxication is not relevant to a claim of self-defense. We further hold the trial court properly denied Appellant's motion *in limine* to preclude the use of the term "victim" at trial because the phrase

"victim" was not unduly prejudicial, given the circumstances of this case. Accordingly, we affirm the judgment of sentence.

Judgment of sentence affirmed.

*JUDGE MUNDY FILES A DISSENTING STATEMENT.

COMMONWEALTH OF PENNSYLVANIA, Appellee v. CURTIS ALLEE WILLIAMS, JR., Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 933 MDA 2011

Appeal from the Judgment of Sentence of May 16, 2011
in the Court of Common Pleas of Dauphin County
Criminal Division at No(s): CP-22-CR-0002330-2009

BEFORE: GANTMAN, ALLEN, AND MUNDY, J.J.

DISSENTING STATEMENT BY MUNDY, J.:

I respectfully dissent from the Majority's well-reasoned opinion concluding that "after-acquired knowledge of intoxication is not relevant to a claim of self-defense." Majority Opinion at 1. I agree with the Majority that evidence of Purdy's intoxication is not relevant to show bias, or to show a greater propensity to engage in violent behavior. However, I disagree that evidence of Purdy's intoxication is not relevant to impeach Purdy's perception and recollection of the events surrounding the shooting. I also disagree that the probative value of the evidence is outweighed by its prejudicial effect.

The Majority concludes that evidence concerning Purdy's intoxication is not relevant to Appellant's claim of self-defense. Majority Opinion at 7. There are many ways to attack a witness' credibility. These include "evidence offered to attack the character of a witness for truthfulness,

evidence offered to attack the witness' credibility by proving bias, interest, or corruption, **evidence offered to prove defects in the witness' perception or recollection**, and evidence offered to contradict the witness' testimony." ***Commonwealth v. Palo***, 24 A.3d 1050, 1055-1056 (Pa. Super. 2011) (citation omitted; emphasis added), *appeal denied*, 34 A.3d 828 (Pa. 2011). More specifically, evidence of "intoxication on the part of a witness at the time of an occurrence about which he has testified is a proper matter for the jury's consideration." ***Commonwealth v. Harris***, 852 A.2d 1168, 1174 (Pa. 2004) (citation omitted). There are limits, however, to introducing evidence of a witness's intoxication. For example, evidence of a witness's alcoholism or history of substance abuse problems would not be admissible. ***Id.***

In ***Commonwealth v. Boich***, 982 A.2d 102 (Pa. Super. 2009) (*en banc*), *appeal denied*, 3 A.3d 669 (Pa. 2010), the appellant challenged a rape victim's ability to recall the events of her attack, and specifically requested that the trial court order her to submit to involuntary psychiatric examination. ***Id.*** at 104. Among the reasons the appellant gave, was her "intoxication, use of narcotic drugs, [and] inability to 'remember material facts[.]'" ***Id.*** at 113. In rejecting the appellant's claims, this Court noted that "evidence that the victim ingested drugs on the evening in question, prior to the alleged attack, would be relevant to a determination of whether the victim's recall was accurate." ***Id.*** at 112. ***See also Commonwealth v.***

Drew, 459 A.2d 318, 322 (Pa. 1983) (stating when self-defense is claimed by an appellant "[t]he question of [her] consumption of alcoholic beverages within [the] time frame [of the crime] would be relevant to the question of whether [the] appellant did in fact have a reasonable belief of an immediate threat to her life[]").

Instantly, Appellant relied on self-defense at trial. As the Majority notes, it was the "central issue" at trial. Majority Opinion at 12 n.4. Therefore, I would conclude that this Court's holding in ***Boich*** is applicable here. That is to say, the victim's consumption of alcoholic beverages within the period in question is an appropriate way for Appellant to challenge the victim's credibility as to his version of events. Although Appellant may not have known that Purdy was intoxicated at the time of the shooting, evidence of Purdy's intoxication would have substantiated his belief that Purdy "was acting crazy."[6] N.T., 3/8/11, at 266. Furthermore, part of the jury's duty in

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[6] On June 28, 2011, the legislature amended the self-defense statute to include a "stand your ground" law. This law abolishes the common law duty to retreat for an actor who is not engaged in illegal activity, and is not in illegal possession of a firearm. 18 Pa.C.S.A. § 505 (b)(2.3) The shooting in this case took place on April 12, 2009, and the legislature did not state that it wished for the "stand your ground" law to be applied retroactively. ***See*** 1 Pa.C.S.A. § 1926 (stating "[n]o statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly[]"). Although it is true that the "stand your ground" law is not available to Appellant, even under the common law duty to retreat, Appellant effectively could not retreat since both he and Purdy were operating motor vehicles at the time. Furthermore, Appellant testified that Purdy got out of his car on Witmer Drive, which serves as an uphill onramp to U.S. Route 322. N.T., *(Footnote Continued Next Page)*

determining the reasonableness of Appellant's belief of imminent bodily harm is weighing Purdy's account of events versus that of Appellant. Factors that would affect Purdy's ability to accurately give that account to the jury are of the utmost importance. The jury must weigh the credibility of each witness's account of the events leading up to the shooting in order to assess the reasonableness of Appellant's belief. In doing so, the jury should be allowed to know any existing factors that could alter a witness's ability to give an accurate and complete account.

The Majority asserts that any error was harmless because the testimony of other Commonwealth witnesses "adequately challenged … Purdy's recollection of the incident." Majority Opinion at 12 n.4. Specifically, the Majority refers to the testimony of Michael Cahill who testified that Purdy reached the driver's side of Appellant's car before Appellant shot him. ***Id.*** While the Majority is correct in its summary of Cahill's testimony, in my view, it is not an adequate substitute. A victim's testimony when presented to a jury is far more powerful, and introducing evidence that directly challenges the victim's ability to recall the events is

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3/8/11, at 259. Appellant's sedan was wedged between Purdy's car and another car in front of his. ***Id.*** at 262. Appellant further testified that it was not possible for his car to wedge out of that spot without shifting between drive and reverse multiple times, cutting off the car in front of him, and unsafely pulling out into another lane of moving traffic on U.S. 322. ***Id.*** at 262-263.

the best method to challenge the victim's credibility rather than through another prosecution witness.

Finally, I respectfully disagree with the Majority's conclusion that any probative value of the intoxication evidence would be outweighed by its prejudicial effect and excluded under Pennsylvania Rule of Evidence 403. Majority Opinion at 12. The Majority concludes the evidence would be too prejudicial because it would "doubtlessly raise a substantial risk the jury might reach a verdict based on extraneous and generalized inferences regarding drunk driving and intoxication."[7] ***Id.*** at 11. In any case where intoxication of a witness is introduced by either side, the "substantial risk" the Majority highlights will always be present. The Majority's fear also appears to conclude, albeit stated another way, that evidence that has probative value in challenging Purdy's credibility cannot be introduced for fear that it will tarnish his credibility. I believe there is a middle ground that could have been used in this case to satisfy the concerns of both the Majority and Appellant. The trial court could have given a limiting instruction, that the jury may take into account evidence of Purdy's

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[7] In my view, the Majority's reliance on ***Commonwealth v. Green***, 434 A.2d 137 (Pa. Super. 1981) is misplaced. In ***Green***, this Court found there was no relation between the victim being molested by her grandfather in the past, and the victim being molested by the appellant, who was an unrelated third party. ***Id.*** at 142-143. In this case, the intoxication evidence would only be admissible to challenge Purdy's ability to perceive and recall events of the present case, not any past incidents.

intoxication only as it relates to his ability to recall the events surrounding the shooting. With this instruction, the jury could have given the intoxication evidence the proper amount of weight it was due in weighing the credibility of Purdy's account in determining the reasonableness of Appellant's belief. The limiting instruction would also alleviate the Majority's concern that the jury would make any improper sweeping conclusions as to Purdy's character.

I would hold that evidence of Purdy's intoxication was relevant to challenge his credibility, and was not overly prejudicial. I would therefore conclude that the trial court abused its discretion in refusing to admit the evidence on that limited basis. Accordingly, I would reverse the judgment of sentence and remand the case for a new trial. I respectfully dissent.