

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA

Appellee

v.

LYNDEL JOHNSON

Appellant

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 3119 EDA 2012

Appeal from the Judgment of Sentence October 5, 2012
In the Court of Common Pleas of Philadelphia County
Criminal Division at No(s): CP-51-CR-0010310-2011

BEFORE: BOWES, J., PANELLA, J., and FITZGERALD, J.*

MEMORANDUM BY PANELLA, J.

FILED NOVEMBER 01, 2013

Appellant, Lyndel Johnson, appeals from the judgment of sentence entered October 5, 2012, by the Honorable Barbara A. McDermott, Court of Common Pleas of Philadelphia County. We affirm.

The trial court summarized the facts of this case as follows:

[S.R.], the fifteen-year-old niece of the decedent, [Shane McCreery,] had, shortly before the August 2, 2011[,], shooting that is the subject of this case, sold [Johnson] a pit bull for \$175, only \$60 of which was paid up front. [S.R.] unsuccessfully brought the debt up with the [Johnson] twice during the week prior to the shooting.

On August 1, 2011[,], before midnight, [S.R.] and her friend Saleem Johnson, [Johnson's] brother, went to the Chinese store, where she told Saleem about the debt, saying that if she did not get the money, she would have her uncles come and get

* Former Justice specially assigned to the Superior Court.

it for her. [S.R.] and Johnson walked to 2311 W. Tioga Street and sat on the front porch with Johnson's sister, Alexis, for approximately [thirty minutes]. At some point, [Saleem] Johnson went inside, saw [Johnson], and told him what [S.R.] had said about her uncles. [Johnson] came out onto the porch and told [S.R.] that he would pistol-whip her if she did not leave the property. [S.R.] left, accompanied by [Saleem] Johnson, and walked to her house, which is one block north on Marvine Street. On the way there, she called [Jason] Cruz, her stepfather, and told him she had been threatened. Cruz called the decedent, who arrived at [S.R.]'s house ten minutes later, accompanied by his brother Isaac Mercado and his cousin Julio Rodriguez. Cruz arrived ten minutes after that.

[S.R.], her mother, Luz Cruz, her two uncles, her cousin Julio Rodriguez, and [Jason] Cruz then walked south on Marvine Street toward the northeast corner of Marvine and W. Tioga Streets. [Johnson] approached the group on the east side of Marvine Street a little north of the intersection, at which point Mr. Cruz and the decedent confronted him about the money. [Johnson] went into his house at 1138 W. Tioga Street and came out with the money, which he gave to Cruz. The decedent and [Johnson] argued briefly. Then, Cruz punched [Johnson] in the head or chest.... [Johnson] was knocked back approximately ten feet.

[Johnson] then turned back toward the group, pulled out a gun, and began shooting at them from about ten feet away, standing in the middle of the street between the northern corners of Marvine and W. Tioga Streets. [S.R.] and Isaac ran east on W. Tioga Street, and Mr. Cruz, the decedent, and Mr. Rodriguez ran north on Marvine Street toward [S.R.]'s house. [Johnson] fired shots at the latter group, following them up Marvine Street and fatally wounding the decedent. Ms. Cruz remained standing in the middle of Marvine Street. [S.R.] doubled back to Marvine Street and observed the incident from behind a car. After running approximately forty-five feet up Marvine Street, Mr. Rodriguez pulled out a handgun and gave it to Mr. Cruz, who aimed it at [Johnson] and fired three times. When [Johnson] finished shooting, he ran back toward the corner of Marvine and W. Tioga and headed west on W. Tioga Street.

Trial Court Opinion, 1/3/13 at 2-4 (record citations and footnote omitted).

Johnson was subsequently arrested for the murder of Shane McCreery. Following a jury trial, Johnson was convicted of murder of the third degree,¹ two counts of aggravated assault,² recklessly endangering another person,³ and firearms not to be carried without a license.⁴ On October 5, 2012, the trial court sentenced Johnson to an aggregate term of 18 ½ to 37 years' imprisonment. On October 15, 2012, the trial court denied Johnson's post-sentence motion. This timely appeal followed.

On appeal, Johnson raises the following issues for our review:

- I. Whether the verdict is against the weight and sufficiency of the evidence regarding the homicide, because medical/scientific evidence could not make a determination of which bullet from which gun killed the victim.
- II. Whether the verdict is against the weight and sufficiency of the evidence concerning the Third Degree Murder conviction, as appellant was not the initial aggressor, the victim and his male relatives were initial aggressors who outnumbered the appellant and who were also convicted felons in possession of at least one firearm and at least one of these aggressors shot at the appellant from at least one gun.

Appellant's Brief, at 4.

"The standard of review for a challenge to the sufficiency of the evidence is to determine whether, when viewed in a light most favorable to

¹ 18 PA.CON.S.TAT.ANN. § 2502(c).

² 18 PA.CON.S.TAT.ANN. § 2702(a).

³ 18 PA.CON.S.TAT.ANN. § 2705.

⁴ 18 PA.CON.S.TAT.ANN. § 6106(a)(1).

the verdict winner, the evidence at trial and all reasonable inferences therefrom is sufficient for the trier of fact to find that each element of the crimes charged is established beyond a reasonable doubt.” **Commonwealth v. Dale**, 836 A.2d 150, 152 (Pa. Super. 2003). The Commonwealth may sustain its burden of proving every element beyond a reasonable doubt by means of wholly circumstantial evidence. **Commonwealth v. Bruce**, 916 A.2d 657, 661 (Pa. Super. 2007), **appeal denied**, 593 Pa. 754, 932 A.2d 74 (2007). The facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. **See id.** Any doubt raised as to the accused’s guilt is to be resolved by the fact-finder. **See id.** As an appellate court, we do not assess credibility nor do we assign weight to any of the testimony of record. **See Commonwealth v. Kinney**, 863 A.2d 581, 584 (Pa. Super. 2004), **appeal denied**, 584 Pa. 685, 881 A.2d 819 (2005). Therefore, we will not disturb the verdict “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.” **Bruce**, 916 A.2d at 662.

Third degree murder is defined as all other murders that are not first or second degree murder:

Third degree murder occurs when a person commits a killing which is neither intentional nor committed during the perpetration of a felony, but contains the requisite malice. Malice is not merely ill-will but, rather, wickedness of disposition, hardness of heart, recklessness of consequences, and a mind regardless of social duty. Malice may be inferred from the use of

a deadly weapon on a vital part of the victim's body. Further, malice may be inferred after considering the totality of the circumstances.

Commonwealth v. Garland, 63 A.3d 339, 345 (Pa. Super. 2013) (citation omitted).

Johnson first argues that the Commonwealth produced insufficient evidence that he fired the bullet that killed the decedent. Although Johnson correctly notes that forensic evidence was unable to establish with certainty that the bullet that killed the decedent came from Johnson's gun, the evidence does not support his contention that the decedent was killed in a crossfire. S.R. testified that she observed Johnson shoot a gun several times at the decedent, Jason Cruz, and Julio Rodriguez as they ran from the scene. N.T., Trial, 8/21/12 at 72. Although S.R. testified that Julio Rodriguez passed a gun to Jason Cruz while they ran from Johnson, she testified that Julio Rodriguez pointed and fired the gun at Johnson, not towards the decedent, who was running away from the scene. ***Id.*** at 134. We agree with the trial court that S.R.'s recollection that Johnson was the only individual firing a gun in the decedent's direction provided sufficient circumstantial evidence from which the jury could establish Johnson fired the bullet responsible for the decedent's death. ***See Bruce, supra*** (Commonwealth may sustain its burden of proving every element beyond a reasonable doubt by means of wholly circumstantial evidence). Accordingly, this claim fails.

Johnson additionally argues that the Commonwealth failed to sufficiently disprove his self-defense claim. "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 the other person." 18 PA.CON.S.TAT.ANN. § 505(a). "Although the defendant has no burden to prove self-defense, ... before the defense is properly in issue, 'there must be some evidence, from whatever source, to justify such a finding.'" **Commonwealth v. Mouzon**, 53 A.3d 738, 740 (Pa. 2012) (citation omitted). Once a justification defense is properly raised, "the Commonwealth bears the burden to disprove such a defense beyond a reasonable doubt." **See Commonwealth v. Torres**, 766 A.2d 342, 345 (Pa. 2001).

The Commonwealth sustains its burden if "it establishes at least one of the following: 1) the accused did not reasonably believe that he was in danger of death or serious bodily injury; or 2) the accused provoked or continued the use of force; or 3) the accused had a duty to retreat and the retreat was possible with complete safety." **Commonwealth v. McClendon**, 874 A.2d 1223, 1230 (Pa. Super. 2005) (citation omitted). "It remains the province of the jury to determine whether the accused's belief was reasonable, whether he was free of provocation, and whether he had no duty to retreat." **Id.**

In finding the evidence sufficient to disprove Johnson's justification defense, the trial court noted the following:

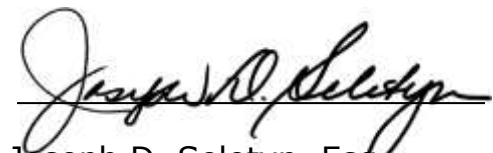
In this case, [Johnson] was reacting to having been struck once by hand at the time he pulled a gun and shot into a group of people facing him. He did not have a reasonable belief that he was in imminent danger of death or great bodily harm, and therefore the use of deadly force was not justified. Further, he was standing in a public street when he began firing his weapon, despite the fact that he had a duty to retreat. He had already retreated once, into his domicile, during the confrontation, and had done so without incident. There is no reason to believe that he could not have retreated again after being struck by [Jason] Cruz.

Trial Court Opinion, 1/3/13 at 10. We agree with the trial court's analysis. We further note that despite Johnson's insistence that his sister testified that Johnson did not initiate the gunfire, this account was contrary to the other testimony adduced at trial and was obviously not credited by the jury. Therefore, we find this argument is similarly without merit.

Johnson fails to raise a separate and distinct challenge to the weight of the evidence in support of his third degree murder conviction. Rather, he merely rehashes the arguments previously put forth in his sufficiency of the evidence claim. As we have already determined these arguments to be unavailing, we need not address them further.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/1/2013