

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:
	:
vs.	: NO. 02-11,326
	:
RICHARD WHEELER,	:
	:
Defendant	: 1925(a) OPINION

Date: July 3, 2003

**OPINION IN SUPPORT OF THE ORDER OF MARCH 7, 2003 IN COMPLIANCE
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

Defendant Richard Wheeler has filed an appeal of this Court's Sentencing Order of March 7, 2003 (filed March 12, 2003). At a jury trial held February 3, 2003 Defendant was found guilty of simple assault, a violation of Crimes Code §2701(a)(1), a misdemeanor of the second degree. The victim of the assault was his wife, Tehani L. Wheeler. At the same proceeding, the Court found Defendant guilty of the summary charge of harassment, a violation of Crimes Code §2709(a)(1).

After a sentencing hearing held on March 7, 2003, the Court sentenced Defendant to serve a minimum of 9 months and a maximum of 24 months in a State Correctional Institution. Defendant was also ordered to pay a fine of \$500 and the costs of prosecution including a case-processing fee of \$200. There was no claim for restitution. The Sentencing Order also made Defendant eligible for the State Correctional Institution Boot Camp and approved therapeutic treatment for Defendant following completion of the minimum sentence.

Defendant filed his Notice of Appeal on April 4, 2003. This Court filed an Order on April 17, 2003 directing Defendant to file a Concise Statement of Matters Complained of on Appeal and directing the preparation of transcripts. On May 2, 2003, Defendant filed a Statement of Matters Complained of on Appeal. Defendant asserts two errors on appeal. The first is that the Court erred in refusing to grant Defendant's oral motion to dismiss the charges on the basis that the Commonwealth had failed to prove beyond a reasonable doubt that Defendant did not act in self-defense. Secondly, Defendant asserts that the statements the prosecuting Assistant District Attorney made in his closing remarks, to the effect that there was evidence presented at a preliminary hearing that was not presented at trial, were so prejudicial to Defendant that justice requires a new trial.

Upon considering these matters the Court believes that its rulings denying these assertions at trial were correct and that the Court stated sufficient reasons on the record at the time of its rulings to support its decision. The alleged failure to prove beyond a reasonable doubt that Defendant did not act in self-defense was first raised by a Motion for Judgment Notwithstanding the Verdict at the conclusion of the trial, as noted in the transcript of the testimony at pages 118 through 123. As to the statements of the Assistant District Attorney in closing, an appropriate objection was raised when the remarks were made and the Court found the remarks were not appropriate. However, it was determined that the remarks were incidental and not prejudicial to Defendant, and the Court gave an appropriate instruction to the jury that the remarks should not be considered and disregarded. N.T. p. 84-87. The Court should note that the essence of the prosecuting attorney's remarks in summation that were objected to also went to the issue as to whether or not the Commonwealth had failed to prove beyond a

reasonable that Defendant did not act in self-defense. Despite these remarks, the Court believes that the evidence clearly was more than sufficient to disprove that defense beyond a reasonable doubt.

Nevertheless, the Court believes some additional comments, particularly as to the issue of self-defense, are appropriate. Following the return of the jury's verdict Defendant made a motion to dismiss the charges based upon the decision of the Pennsylvania Supreme Court in *Commonwealth v. Torres*, 766 A.2d 342 (Pa. 1999). The reliance of Defendant on *Torres* is primarily focused upon the fact that the asserted victim in *Torres* had struck the first blow to the defendant, Torres. Although the Supreme Court did overturn Torres' conviction, it was not solely on the basis of the fact that the victim had struck the first blow.

This Court, at the time the motion was made, thoroughly reviewed on the record the distinction between the actual situation in *Torres* as opposed to that created by Defendant Wheeler. N.T. 120-122. In *Torres*, it was clear that the victim was the initial aggressor, but after being pushed away by Defendant Torres the victim continued to come at Torres and punch at him. Subsequently, Torres threw "another punch" that inflicted the injury upon the victim. *Id.* at 342.

The contrast of the factual situation in this case is that although the victim, Mrs. Wheeler, acknowledged that she had punched first at her husband, she was thereafter struck five or six times in the head by her husband with a closed fist. Defendant is obviously much larger in physical size than his wife and at the same time his wife was holding their baby and obviously was quite defenseless from this assault. Clearly, this evidence means Defendant did not act in self-defense.

Therefore, the contention that the Commonwealth failed to prove beyond a reasonable doubt that Wheeler failed to act in self-defense must fail. Before a claim of self-defense can go to the jury, there must be some evidence, from whatever source, that would justify a finding of self-defense. *Commonwealth v. Mayfield*, 585 A.2d 1069, 1070 (Pa. Super. 1991); *Commonwealth v. Bailey*, 471 A.2d 551, 553 (Pa. Super. 1984). If there is such evidence, the burden is placed upon the Commonwealth to disprove the claim of self-defense by a reasonable doubt. *Commonwealth v. Samuels*, 590 A.2d 1245, 1247 (Pa. 1991).

The claim of self-defense applies to all citizens pursuant to 18 Pa.C.S. §505. *Moorehead v. Civil Service Comm'n*, 769 A.2d 1233 (Pa. Cmwlth. 2001). An individual may use force upon or toward another if “he 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. §505(a). There is no duty to retreat in situations involving non-deadly force. *Commonwealth v. Pollino*, 467 A.2d 1298, 1300 (Pa. 1983). An individual can meet non-deadly force with force “ ‘so long as it is only force enough to repel the attack.’” *Commonwealth v. Witherspoon*, 730 A.2d 496, 499 (Pa. Super. 1999) (quoting *Pollino*, 476 A.2d at 1301). The force used must be reasonable under the circumstances. *Commonwealth v. Presogna*, 292 A.2d 476, 477 (Pa. Super. 1972). If the use of force is excessive, then the claim of self-defense is forfeited. *Ibid*; *Morehead*, 769 A.2d at 1239 (Defendant did not act in self defense when during a twenty minute “wrestling match” with a fellow officer he struck the other officer in the head with a coffee cup because such an action was an escalation of violence.); *Witherspoon*, 730 A.2d at (Defendant acted in self defense by open hand slapping a

person in face when that person had been aggressive and threatening toward the Defendant and such action was not excessive under the circumstances.)

In this case, the Court did charge the jury on self-defense solely because Defendant did testify she struck first and then did not remember anything else. N.T. pp. 32, 42. However, Defendant's argument that the mere fact his wife struck him first establishes self-defense as a matter of law is inaccurate and simplifies what self-defense constitutes. To raise the claim of self-defense, the evidence must demonstrate that, under the circumstances of the situation, the use of force was necessary to protect the defendant. The act of striking a person alone would not automatically cloak the defendant's actions in self-defense. For instance, Person A could strike Person B in the face and then flee. If Person B ran after Person A and struck him, then there likely would be no self-defense because there was no immediate necessity for Person B to defend himself since Person A and the threat posed by him had been eliminated by the flight. However, more often than not, when a person strikes another the issue of self-defense will usually arise. In those situations, it is often the case that the person is displaying aggression and has demonstrated that aggression by physical force.

Viewing the testimony of Mrs. Wheeler in the most favorable light, it is possible to raise a claim for self-defense. Mrs. Wheeler testified that she was angry the night of the incident because her son had been at the then Defendant's girlfriend's home. N.T. p. 40-1. She also testified that she was intoxicated on the night of the incident. N.T. pp. 40, 41. Mrs. Wheeler testified that she had hit Defendant then he hit her. N.T. p. 32. This occurred as Defendant approached her in order to get their son from her. N.T. p. 42. Taken as a whole, it is possible to argue that Mrs. Wheeler was in an intoxicated and agitated state when she was

interacting with Defendant and demonstrated her willingness to manifest her agitation through physical violence. There were no indications that Mrs. Wheeler was backing down or was less aggressive in her demeanor or actions. An argument can be made that it was reasonable for Defendant to use force to protect himself from Mrs. Wheeler's aggression.

The problem is that Defendant's response to any aggression on Mrs. Wheeler's part was unreasonable. The Defendant struck Mrs. Wheeler in the face or head area an estimated five to six times. N.T. p. 34. The first blow likely eliminated any threat posed by Mrs. Wheeler. There is testimony she fell to the ground. N.T. p. 33. She was always holding their child. N.T. pp. 32, 39. There is no indication that Mrs. Wheeler continued her aggressive nature toward Defendant after her first striking him or that she had the physical capabilities to withstand receiving more than one blow from her husband and continue to assault him. There is no indication that Mrs. Wheeler was trying to access a weapon or some other device to use against Defendant. In short, there is no evidence to support the actions taken by Defendant for beating up his wife.

Consequently, Defendant forfeited the claim of self-defense by using excessive force when he struck Mrs. Wheeler several times in the head and face area.

In talking about self-defense in summation, it is acknowledged that the prosecuting attorney exceeded the proper bounds of argument by making a statement to the effect that there was no real evidence from Mrs. Wheeler that she had done anything to assault her husband and that while the Commonwealth relied upon refreshing her memory through preliminary hearing transcript testimony the defense could not point to the preliminary hearing testimony to show anything in support of self-defense. However, this error was harmless. The

dispute between the parties had arisen when they were separated and were having an argument over the custody of their child, Kane Wheeler. At the time of trial, Mr. and Mrs. Wheeler had restored their relationship, at least somewhat. N.T. p.36. Mrs. Wheeler's testimony at trial made it clear that she was anything but a cooperative witness for the Commonwealth. It was either Mrs. Wheeler's reluctance or inability to remember the events of the evening in question that caused the District Attorney to refer to the preliminary hearing transcript in order to refresh her recollection.

Overall, the statement was an incidental part of the summation and was not focused onto any large degree, particularly given defense counsel's appropriate and timely objection. This Court, in its instructions to the jury, made it clear that that argument was to be discarded. We believe that this instruction was appropriate and effective. N.T. p. 87. Regardless, the evidence is overwhelming that Defendant assaulted his wife when she was in a virtually defenseless position being intoxicated and holding a child at the time. Clearly the jury's verdict was appropriate.

Accordingly, this Court believes that the Appeal should be denied and the judgment of sentence upheld.

BY THE COURT,

William S. Kieser, Judge

cc: William Simmers, Esquire, ADA
Public Defender's Office
Judges
Christian Kalas, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)