

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, :  
 :  
 vs. : NO. 639-2004  
 :  
 DAVID WADE HOWARD, :  
 :  
 Defendant : 1925(a) OPINION

**Date: November 1, 2006**

**OPINION IN SUPPORT OF THE ORDER OF APRIL 28, 2006 IN COMPLIANCE  
WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE**

Defendant David Howard (hereafter “Howard”) has appealed his sentence of April 28, 2006. The appeal should be denied. The Commonwealth presented sufficient evidence to establish beyond a reasonable doubt that Howard’s use of deadly force against Wayne Ware was not justified. The taking of Officer Roy Snyder’s deposition outside of the jury’s presence was inappropriate, but the admission at trial of Officer Snyder’s deposition testimony was a harmless error. Howard has waived his challenge to the discretionary aspects of his sentence by failing to raise the issue at the time of sentencing or in a post-sentence motion.

**I. BACKGROUND**

**A. Procedural History**

On March 4, 2004, a criminal complaint was filed against Howard charging him with: Count 1 Aggravated Assault, 18 Pa.C.S.A § 2702(a)(1); Count 2 Aggravated Assault, 18 Pa.C.S.A. § 2702(a)(4); Count 3 Simple Assault, 18 Pa.C.S.A. § 2701(a)(2); Count 4 Simple Assault, 18 Pa.C.S.A. § 2701(a)(2); Count 5 Recklessly Endangering Another Person, 18 Pa.C.S.A. § 2705; and Count 6 Terroristic Threats, 18 Pa.C.S.A. § 2706(a)(1). A jury trial regarding the above referenced charges was held before this court from December 12, 2005

through December 15, 2005. On December 15, 2006, the jury returned a verdict of guilty on all charges.

On April 28, 2006, the court sentenced Howard. As to Count 1 Aggravated Assault, the court sentenced Howard to confinement at a state correctional institution for a minimum term of sixty-six months and a maximum term of twelve years. As to Count 6 Terroristic Threats, the court sentenced Howard to thirty-six months probation under the supervision of the Pennsylvania Board of Probation and Parole. The court further ordered that the sentences under Counts 1 and 6 were to be served consecutive to each other. As to Counts 2, 3, 4, and 5, the court found that they merged with Count 1 for purposes of sentencing.

On May 26, 2006, Howard filed his notice of appeal. On June 1, 2006, this court issued an order in compliance with Pennsylvania Rules of Appellate Procedure Rule 1925(b) directing Howard to file a concise statement of matters complained of on appeal within fourteen days of the order. On June 9, 2006, Howard filed a Petition to Extend Time for filing a 1925(b) Statement. On June 12, 2006, the court granted Howard's Petition and extended the time for filing the statement of matters until August 16, 2006. On August 14, 2006, Howard filed his statement of matters.

In the statement of matters, Howard raises the following issues:

1. The Defendant avers that the Court erred by determining that Officer Snyder was unavailable for trial when he was scheduled for schooling, and thereafter permitting a deposition of Officer Snyder, and finally by admitting portions of the deposition to be read to the jury.
2. The Defendant further avers that the evidence was insufficient to disprove self-defense beyond a reasonable doubt.

3. Finally, the Defendant submits that the trial court abused its discretion in imposing sentence because of the Defendant's lack of prior criminal history and occupation.

Defendant's Concise Statement of Matters Complained of on Appeal.

## **B. Facts**

### **1. Events of February 19, 2004**

In February 2004, Wayne Ware lived at 638 Market Street, Williamsport, Pennsylvania with his friend, Ronald Nesmith, and his wife. Notes of Testimony, 32, 33 (12/12/05). It was through the Nesmiths that Ware became acquainted with Lakisha Young. Id. at 33. The two started dating sometime in November or December 2004 and their relationship evolved to an intimate level. Id. at 33, 34.

On February 19, 2004, Ware received a call on his cell phone from Young while he was at work. N.T., 35, 36 (12/12/05). The conversation was brief, but Young was able to tell Ware that there was something she wanted to talk to him about. Id. at 36. When Ware returned to his residence after work he received another phone call from Young. Id. at 37. Young asked Ware if he would come over to her residence to baby-sit her three children so that she could go to the Mardi Gras celebration. Id. at 35, 37. Ware said he would. Id. at 37.

The phone calls from Young were not the only ones that Ware received that day. While he was at his day and evening jobs, Ware received a number of calls on his cell phone and had a number of messages. N.T., 40, 74 (12/12/05). About seven or eight of those messages were from Howard and were of a threatening nature. Id. at 40, 41, 74.

Ware arrived at Young's residence around 11:00 p.m. on the night of February 19, 2004. N.T., 44 (12/12/05). Young lived at 309 High Street Apartment 2, Williamsport,

Pennsylvania, which was approximately one block away from Ware's residence. Id. at 34, 65, 182. When Ware arrived at Young's residence, the only individuals who were in the residence were Young, her three children, and a female friend of Young's. Id. at 45. Young left for the Mardi Gras celebration almost immediately after Ware arrived at the residence. Ibid. Ware watched television for about an hour, and then he went into Young's bedroom to go to bed. Ibid.

Young returned to her residence at approximately 1:56 a.m. N.T., 46 (12/12/05). Young had been drinking and was somewhat intoxicated. Id. at 92. Ware was awake and the two talked for a few minutes. Id. at 46. During their conversation, the phone rang a number of times. Id. at 46, 49. Eventually, Young answered it, and, in response to an inquiry by Ware as to who was on the phone, said it was "Crazy David." Ibid. "Crazy David" was Young's nickname for Howard. Id. at 88. Young said a few words to Howard and hung up the phone. Id. at 49. After the phone call, Ware and Young had sex and went to sleep. Id. at 50, 93. At that point in time, Ware was only dressed in a tee shirt and socks. Id. at 50. His jeans, boots, hooded sweatshirt, and black jacket were on the bedroom floor. Id. at 64.

## **2. Ware's Version of the Altercation with Howard**

Between 4:00 and 5:00 a.m., Ware became aware that someone was in the residence as he saw a light coming from the area of the kitchen. N.T., 50, 55 (12/12/05). Ware leaned forward in bed, and then laid back down. Ibid. As soon as Ware laid back down, Howard was standing in the doorway of the bedroom. Id. at 50, 56, 57. Howard entered the bedroom walking toward the foot of the bed in which Ware and Young were laying. Id. at 57, 100. As he was doing this, Howard said, in a harsh tone, "I told you about fucking with my kids, my

wife, and my family.” Id. at 56, 57-58. As Howard reached the foot of the bed, Ware raised his legs in a defensive posture. Id. at 58, 101, 136. Howard stopped and backed up. Ware was then able to stand up beside the bed. Id. at 58, 101, 102.

Ware had been sleeping on the left side of the bed. N.T., 54, 55 (12/12/05). The left side of the bed was about one foot away from the bedroom wall. Id. at 54. When Ware had stood up along the side of the bed, he was approximately four to five feet away from the doorway leading into the living room, which was the only exit from the bedroom. Id. at 102, 137. Howard was between him and the doorway. Id. at 103, 112.

Once Ware was able to get out of bed, he told Howard that he was leaving. N.T., 58, 59, 136 (12/12/05). Ware started moving toward the doorway, and Howard struck Ware on the left side of his face near the cheekbone with a black handgun. Id. at 60-61, 62, 107, 108. Ware turned his face and again moved toward the doorway in an attempt to leave the apartment. Id. at 108-10. Howard then stretched out his left arm and placed his left hand on Ware’s chest so as to prevent Ware from moving toward the doorway. Id. at 62, 111. Using his right hand, Howard stuck the handgun to Ware’s chest. Id. at 62, 63, 69, 113. Howard fired the handgun and the bullet entered Ware’s left side. Id. at 63, 69, 113. Ware responded by asking Howard why he had shot him when Ware was trying to leave the apartment. Ibid. After this, Howard aimed the hand gun at Ware’s head. Ibid. Ware was then able to move past Howard and exit the bedroom. Id. at 63, 114.

### **3. Howard’s Version of the Altercation with Ware**

Howard was an eighteen year veteran of the Philadelphia Police Department. N.T., 2 (12/13/05). Before becoming a member of the Philadelphia Police Department, Howard was a

transit police officer with S.E.P.T.A. for two years. *Ibid.* On February 19, 2004, Howard had been working, and his shift ended around 10:00 p.m. *Id.* at 14, 29, 51. Around 10:30 p.m., Howard left Philadelphia for Williamsport. *Id.* at 14-15. Howard was coming to Williamsport to visit with Young and her children, who he treated as if they were his own, and to give Young some money. *Id.* at 5, 15, 16, 31.

Howard arrived at Young's residence sometime after 1:00 a.m. N.T., 14 (12/13/05). He parked his vehicle in the driveway, and then proceeded to enter the residence. *Id.* at 15. To gain entry, Howard used the set of keys that Young had given him. *Id.* at 13, 16. After using the keys to open the door, Howard walked up the stairs to Young's residence. *Id.* at 16. Howard first went to the children's room to check on them. *Ibid.* He entered their room, turned on the light, gave them a hug, turned off the light and exited the room. *Id.* at 17. Next, Howard entered the bathroom and turned the light in that room on. *Ibid.* This was the only light that was on in Young's apartment at the time. *Id.* at 17, 18. Howard then exited the bathroom and went to Young's bedroom. *Ibid.*

Howard opened the bedroom door, and, despite it being dark, was able to determine that there was an unidentified person lying in the bed. N.T., 18, 19, 38 (12/13/05). In a matter of seconds, this unidentified individual charged Howard and kicked him in the chest. *Id.* at 19, 20, 36. The kick caused Howard to stumble and fall to the ground landing on his back side. *Id.* at 20, 37. As he was trying to get up, Howard realized that his sidearm had fallen out of its holster. *Id.* at 20, 36. Howard had been wearing his service issue sidearm in a holster that was designed to be clipped to one's belt and tucked inside the wearer's pants. *Id.* at 7. The particular holster that Howard was wearing did not have a latch to keep the firearm from falling

out. Id. at 37. Howard was able to pick up his sidearm, but before he could place it back in his holster the unidentified individual began to charge at him once again. Id. at 20. The unidentified individual was just about over Howard when Howard struck him hard in the side of the face with his sidearm. Id. at 21, 38. After this, Howard was able to regain his feet. Id. at 38.

Despite being struck in the face with the sidearm, the unidentified individual started to come toward Howard again. N.T., 21 (12/13/05). In response, Howard pointed his weapon at the individual and instructed him to back away. Ibid. The unidentified individual did not heed Howard's instruction, but instead grabbed the muzzle of the handgun. Id. at 21, 22, 38. A struggle over the handgun ensued with both men pulling on the weapon. Id. at 22, 38. During this struggle, the handgun discharged, and the unidentified individual was struck by the bullet. Id. at 22. The individual expressed disbelief at being shot. Id. at 22-23. Howard told the individual that he needed to go to a hospital. Id. at 23. Before that could be done, the unidentified individual left the residence. Id. at 24.

Howard did not pursue the unidentified individual. N.T., 24 (12/13/05). Instead, he went to check on the children and tried to wake Young. Ibid. After making sure everyone was alright, Howard called the police. Ibid.

#### **4. Ware's Exit**

Ware went down the stairs and out of the building. N.T., 114 (12/12/05). Ware then proceeded to his residence at 638 Market Street, which was only about one block away. Id. at 64, 65, 115. Ware was going there because he needed someone to take him to the hospital. Id. at 65. When Ware arrived at 638 Market Street, he began banging on the door and calling out

for Ronald Nesmith. Id. at 65-66, 143. Nesmith eventually answered the door, and Ware fell in to the residence from the door way. Id. at 144. Nesmith asked Ware what had happened, and Ware told him that he had been shot. Ibid. Nesmith saw that Ware was only wearing an undershirt and socks. Ibid. Ware had left Young's apartment wearing only the tee shirt and socks that he had worn when he went to bed. Id. at 70. His clothes where still on the floor of Young's bedroom. Id. at 70. Nesmith gave Ware his robe to wear and drove him to the hospital. Id. at 66, 144.

### **5. Ware's Injuries**

Ware and Nesmith arrived at the Williamsport Hospital emergency room. N.T., 66 (12/12/05). Nesmith went in and advised the emergency room staff that he had an individual who had been shot. Id. at 144. Emergency room staff got Ware out of Nesmith's truck and transported him inside the emergency room. Id. at 144, 195. Emergency room physician Gregory Frailey, M.D. treated Ware. Id. at 195. Doctor Frailey determined that Ware had a single gun shot wound in the left upper abdomen at the adjunct of the abdomen and the chest. Id. at 196. Ware's vital signs were stable, but he complained of pain in the abdomen and difficulty breathing. Id. at 195. Doctor Frailey initiated the administration of intravenous fluids, had blood drawn, and had x-rays taken. Id. at 195-96. Ware was taken to surgery where an exploratory laparotomy was performed to determine the extent of his internal injuries. Id. at 199. The bullet had entered Ware's upper abdomen, struck and fractured a rib, then traveled downward coming to rest in the abdominal cavity in the area of the lower pelvis. Id. at 196-197, 207, 212. It was determined that Ware had suffered a partially collapsed left lung and an injury to his kidney as a result of the gunshot. Id. at 196-98.



## **II. ISSUES**

Howard's statement of matters raises four issues on appeal. They are:

- (1) Whether the Commonwealth presented sufficient evidence at trial to establish beyond a reasonable doubt that Howard's use of force against Ware was not justified?
- (2) Whether the court erred by permitting the deposition of Officer Snyder to be conducted outside the presence of the jury?
- (3) Whether the admission at trial of Officer Snyder's deposition testimony was an error requiring a new trial?
- (4) Whether the court abused its discretion and imposed a harsh and excessive sentence when it failed to appropriately consider Howard's lack of a criminal record and his service as a police officer?

## **III. DISCUSSION**

The discussion section of this opinion will be divided into three main parts. First, we will address why the Commonwealth presented sufficient evidence to establish beyond a reasonable doubt that Howard was not justified in using deadly force against Ware in self-defense. Second, we will address why it was inappropriate to take Officer Snyder's deposition testimony, but the admission of it at trial was a harmless error not requiring a new trial. Finally, we will address why Howard has waived his challenge to the severity of his sentence.

### **A. Sufficiency of the Evidence Challenge to Howard's Self Defense Claim**

#### **1. Standard of Review**

A claim challenging the sufficiency of the evidence is a question of law. *Commonwealth v. Sullivan*, 820 A.2d 795, 805 (Pa. Super. 2003), *app. denied*, 833 A.2d 143 (Pa. 2003). When reviewing a challenge to the sufficiency of the evidence, the following standard of review is employed:

‘The standard we apply when reviewing the sufficiency of the evidence is whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. 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. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence.’

*Commonwealth v. Gray*, 867 A.2d 560, 567 (Pa. Super. 2005), *app. denied*, 879 A.2d 781 (Pa. 2005) (quoting *Commonwealth v. Nahavandian*, 849 A.2d 1221, 1229-30 (Pa. Super. 2004)). Direct and circumstantial evidence receive equal weight when assessing the sufficiency of the evidence. *Commonwealth v. Grekis*, 601 A.2d 1275, 1280 (Pa. Super. 1992).

## **2. General Rules and Principles Regarding Self-Defense**

“[T]he law of Pennsylvania does not require one to stand by helplessly while he is injured or killed by an assailant.” *Commonwealth v. Fowlin*, 710 A.2d 1130, 1133 (Pa. 1998). The claim of self-defense applies to all citizens pursuant to Section 505 of the Pennsylvania Crimes Code, 18 Pa.C.S.A. §§ 101 – 9352. *Moorehead v. Civil Serv. Comm’n*, 769 A.2d 1233, 1238 (Pa. Cmwlth. 2001). Generally, an individual may use force upon 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.A. §

505(a). A person is permitted to use deadly or non-deadly force in self-defense depending upon the circumstances. *See*, 18 Pa.C.S.A. § 505(b)(1), (2).

### **3. The Altercation Between Howard and Ware**

It is because the circumstances of a given situation are crucial in determining whether the use of force in self-defense was justified that the court must determine what occurred in the early morning hours of February 20, 2004. The evidence presented at trial provided two versions of events. At the most basic level, the first version was that Howard struck Ware in the face with the handgun and then later shot him in the chest as Ware was attempting to leave the bedroom. The second version was that Ware was shot as he and Howard struggled for control of the handgun after Ware had charged Howard and knocked him to the ground.

The evidence presented at trial does not support the first version of events. Ware testified that Howard was standing between him and the bedroom door. Ware testified that he would have had to go past Howard or climb over the bed to get to the door. Ware testified that Howard stopped him from exiting the bedroom by extending his left arm and placing his left hand on Ware's chest and used his right hand to stick the handgun in his chest. In this version of events, Howard and Ware would have been standing face to face in close proximity to one another. As such, the likely position of the handgun in relation to Ware's person would have been straight on and near him.

Doctor Frailey testified that the path of the bullet once it entered Ware's body could not have been the result of the weapon being pointed straight at Ware with the bullet entering Ware straight on. N.T., 212 (12/12/05). Doctor Frailey testified that the wound was generally circular with a bit of irregularity. *Id.* at 196. He indicated that there was some stippling around

the area of the wound. Ibid. Doctor Frailey testified that stippling occurs when unburned gun powder is discharged from a firearm and becomes imbedded in the skin. Id. at 203. According to Doctor Frailey, stippling occurs when the muzzle of the firearm is less than twenty-four inches away from the skin. Ibid. Doctor Frailey was of the opinion that the stippling indicated that the firearm which was used to shoot Ware was located less than twenty-four inches away from him when it was discharged. Id. at 204. Doctor Frailey also testified that the path the bullet took indicated a downward trajectory. Id. at 207, 212. The bullet entered the left upper quadrant of Ware's abdomen below the nipple line. Id. at 195, 196, 204. Dr. Frailey testified that the bullet traveled downward struck and fractured a rib before damaging Ware's left lung. Id. at 197, 198, 207. Dr. Frailey testified that the bullet continued its downward path and came to rest in Ware's abdominal cavity in the region of his pelvis. Id. at 196, 197.

Dr. Frailey did testify that it would be possible to hold the weapon straight out and have the muzzle of the weapon pointed downward. N.T., 213 (12/12/05). This downward angle of the muzzle could then produce a downward trajectory for a round fired from that weapon. However, the possibility that the muzzle of the handgun was angled downward is not likely under Ware's version of the events.

To produce the downward angle, Howard would have had to have angled his wrist downward. Based upon Ware's testimony, this is an unlikely result for two reasons. First, Howard and Ware were standing face to face and in close proximity. As such, Howard's target was directly in front of him and there would be no need for him to point the weapon downward. Second, Howard was a trained police officer who likely would not hold the weapon in such a manner. Howard had been a police officer for twenty years, and would have received extensive

firearms training during that period. Presumably, Howard would have wanted to shoot Ware when he pointed the handgun at him. If this is true, then it would be highly unlikely that a trained police officer would hold the handgun in such an unstable and awkward position. Instead, Howard likely would have held the handgun in a straight position with his wrist aligned with his arm in a proper shooting position. Thus, the factual evidence does not support Ware's version of events.

The evidence presented at trial does support Howard's version of events. Howard testified that Ware had grabbed the muzzle of the weapon and the two of them were pulling back and forth on it to gain control. This struggle for control over the handgun could have resulted in the downward trajectory of the bullet.

Ware's struggle with Howard could have easily caused the muzzle of the handgun to angle downward, thereby producing the downward trajectory of the bullet. Whether Ware grabbed the gun by or near the muzzle with an overhand or underhand grip, he would have been pulling the handgun in the direction of his body. The momentum of the handgun would have caused the handgun to continue its course of travel in the direction of Ware's body unless acted upon by an outside force. Here, that force was Howard pulling on the handgun in the opposite direction. This force would have been exerted primarily upon the handle of the handgun. The force exerted by Howard pulling in the opposite direction combined with his grip on the handle of the handgun would have created a fulcrum. Ware's pulling force would then have been directed against this fulcrum causing the muzzle to angle downward.

The downward trajectory of the bullet could also have been the result of Ware's body position relative to the muzzle of the handgun. Howard and Ware were face to face and in

close proximity to each other. As Howard and Ware struggled for control of the handgun, it is conceivable that Ware may have lowered himself and/or bent at the waist. Ware would have likely done this to gain more leverage in order to wrestle the gun from Howard's grasp. This would have placed his body lower and at angle to the muzzle of the handgun. Accordingly, the court finds that the second version of events, as related by Howard, is the version that the evidence supports; therefore that is the version that will be examined to determine whether Howard was justified in using force against Ware in self-defense.

In the second version of events, the handgun is fired while Howard and Ware are struggling for control of it. If this is true, then the actual firing of the weapon was an accident. As a general rule, a claim of self-defense is not available in situations where the injury was produced by an accident. *Commonwealth v. Harris*, 665 A.2d 1172, 1175 (Pa. 1995); *Commonwealth v. Hobson*, 398 A.2d 1364, 1368 (Pa. 1979). However, a claim of self-defense may arise in a situation where the injury produced was the result of an accident so long as the accident occurred while the defendant was defending himself against the injured person's aggression. *Commonwealth v. Buska*, 655 A.2d 576, 586 (Pa. Super. 1995), *app. denied*, 664 A.2d 972 (Pa. 1995). In order to determine whether Howard acted in self-defense, his conduct must first be classified because the type of conduct will determine the standard by which it will be judged.

The firing of the handgun occurred while Howard was defending himself against Ware. The struggle over the handgun occurred after Ware had charged Howard and kicked him causing Howard to fall to the ground. Howard then struck Ware with the handgun. After Howard was able to regain his feet, Ware started to move toward Howard for the second time.

Howard pointed the handgun at Ware and instructed him to back away. The act of pointing a handgun at another person constitutes an act of using deadly force. *Commonwealth v. Mayfield*, 585 A.2d 1069, 1077 (Pa. Super. 1991). Therefore, the court will determine whether Howard was justified in using deadly force against Ware.

#### **4. Use of Deadly Force in Self-defense General Rules and Principles**

In a criminal matter, the defendant does not have the burden of proving a claim of self-defense. *Commonwealth v. Black*, 376 A.2d 627, 630 (Pa. 1977); *Commonwealth v. Mayfield*, 585 A.2d 1069, 1071 (Pa. Super. 1991). However, before a claim of self-defense may be placed before the trier of fact, there must be some evidence, from whatever source, to justify a finding of self-defense. *Commonwealth v. Torres*, 766 A.2d 342, 345 (Pa. 1999); *Commonwealth v. Elmer*, 903 A.2d 1273 (Pa. Super. 2006). If there is such evidence, then the burden is placed upon the Commonwealth to disprove the claim of self-defense beyond a reasonable doubt. *Commonwealth v. Samuels*, 590 A.2d 1245, 1247 (Pa. 1991); *Commonwealth v. Gray*, 867 A.2d 560, 568 (Pa. Super. 2005), *app. denied*, 879 A.2d 781 (Pa. 2005).

In order to satisfy its burden of disproving that a defendant acted in self-defense with regard to the use of deadly force, the Commonwealth must establish one of the following:

- (1) that the defendant did not reasonably believe that it was necessary to use deadly force in order to protect himself against death or serious bodily injury, or that the defendant used more force than was necessary to save himself from death, serious bodily injury, or the commission of a felony;
- (2) that the defendant provoked or continued the use of force; or
- (3) that the defendant had a duty to retreat and that retreat was possible with complete safety.

*Commonwealth v. McClendon*, 874 A.2d 1223, 1230 (Pa. Super. 2005); *Commonwealth v. Burns*, 765 A.2d 1144, 1149 (Pa. Super. 2000), *app. denied*, 782 A.2d 542 (Pa. 2001); *see also*, 18 Pa.C.S.A. § 505(b)(2). If the Commonwealth establishes any one of the three elements beyond a reasonable doubt, then the conviction is insulated from a challenge to the sufficiency of the evidence where self-defense is at issue. *Commonwealth v. Eberle*, 379 A.2d 90, 93 (Pa. 1977); *Burns*, 765 A.2d at 1149.

A person may use deadly force to defend himself, but only if he reasonable believes himself to be in danger of death or serious bodily injury and that it was necessary to use deadly force against the assailant to prevent such harm. *Commonwealth v. Brown*, 421 A.2d 660, 663 (Pa. 1980); *see also*, 18 Pa.C.S.A. § 505(b)(2). The reasonableness of a defendant's belief in the need to use deadly force is an issue for the finder of fact to determine. *McClendon*, 874 A.2d at 1230; *Commonwealth v. Hill*, 629 A.2d 949, 952 (Pa. Super. 1993), *app. denied*, 645 A.2d 1313 (Pa. 1994). In making this determination, the finder of fact must look at what occurred during the confrontation, as well as, the circumstances and events that preceded the confrontation. *See, Brown*, 421 A.2d at 664.

##### **5. Howard's Belief in the Necessity to Use Deadly Force was not Reasonable**

The evidence presented at trial was sufficient to establish beyond a reasonable doubt that Howard's belief in the necessity to use deadly force against Ware was unreasonable. Howard was not in danger of death or serious bodily injury at the hands of Ware.<sup>1</sup> Ware was not armed during the altercation with Howard, and consequently did not have any weapon with



which he could have killed Howard or inflicted serious bodily injury. The aggression Ware displayed toward Howard was an attempt to tackle and grapple with him. While this may have resulted in some injury to Howard, and thereby justify the use of non-deadly force against Ware, it did not rise to such a risk of serious injury as to justify the use of deadly force. This same conclusion was reached in two cases.

The first is *Commonwealth v. Hill*, 629 A.2d 949 (Pa. Super. 1993), *app. denied*, 645 A.2d 1313 (Pa. 1994). In *Hill*, the defendant, the victim, and two other men had been drinking alcohol throughout the day. 629 A.2d at 951. The defendant and the victim began to argue about the origin of a rumor that the victim was sleeping with another individual's wife. The defendant left the victim and went to a bar to continue drinking. *Ibid.* Later that evening, the defendant arrived at the apartment of a mutual friend he and the victim shared. The victim was also at the apartment, and brought up the rumor again. The victim threatened to get his brother's friends to beat up the defendant and the defendant's brother. *Ibid.* The victim grabbed the defendant by the shirt collar and a struggle ensued. *Ibid.* The victim was about six feet tall weighing two hundred and five pounds while the defendant weighed one hundred and five. *Ibid.* During the struggle, the defendant stabbed the victim in the chest. *Ibid.* The two fell to the floor with the victim landing on top of the defendant. The defendant swung the knife at the victim's chest and was able to get out from under him and stand up. *Ibid.* The victim later died as a result of the stab wound to the chest.

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<sup>1</sup> Serious bodily injury is “[b]odily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” 18 Pa.C.S.A. § 2301.

The Superior Court held that the record supported the finder of fact's determination that the defendant's belief that it was necessary to use deadly force was unreasonable. *Hill*, 629 A.2d at 952. The Superior Court found that the record demonstrated that the defendant was not in danger of imminent death or serious bodily injury at the hands of the victim. *Ibid*. The Superior Court noted that at no time during the altercation was the victim armed with a weapon. *Ibid*. The Superior Court also stated that the victim's act of grabbing the defendant by the shirt collar did not constitute an act that posed a risk of death or serious bodily injury to the defendant such that he would be justified in using a knife to defend himself, despite the victim's much larger size. *Ibid*.

The second case is *Moorehead v. Civil Service Commission*, 769 A.2d 1233 (Pa. Cmwlth. 2001). In *Moorehead*, two police officers became engaged in an altercation inside the police station. 769 A.2d at 1235. The two grabbed each other and proceeded to wrestle with one another for approximately twenty minutes. *Ibid*. At one point, one of the officers grabbed a coffee cup and used it to strike the other officer in the head. *Ibid*. As a result, the second officer sustained a laceration to his head. *Ibid*. The officer who used the coffee cup to strike the other claimed that the second officer was the initial aggressor and that he was acting in self defense.

The Commonwealth Court held that the officer who used the coffee cup against the other was not acting in self defense when he used the coffee cup. *Moorehead*, 769 A.2d at 1239. The Commonwealth Court noted that the use of the coffee cup was an escalation of the violence. *Ibid*. The Commonwealth Court concluded that the use of the coffee cup during the wrestling match was excessive and more force than was needed to repel the attack. *Ibid*.

As was the case in *Hill* and *Moorehead*, Howard was not justified in pointing the handgun at Ware. The altercation that occurred between Howard and Ware during the early morning hours of February 20, 2004 may be best characterized as a wrestling match or a prelude to one. As was the case in *Hill*, Ware's attempts to tackle and grapple with Howard did not place Howard in danger of death or serious bodily injury. As was the case in *Moorehead*, Howard escalated the violence by pointing the handgun at Ware and used more force than was necessary to repel Ware's aggression. As such, Howard's belief that he was in danger of death or serious bodily injury was not reasonable; therefore, his use of deadly force against Ware was not justified.

Accordingly, the Commonwealth presented sufficient evidence to establish beyond a reasonable doubt that Howard did not act in self-defense when Ware was shot.

**B. The Preservation and Admissibility of Officer Snyder's Testimony**

On December 12, 2005, the deposition of Officer Roy Snyder was conducted before this court outside of the presence of the jury pursuant to Pennsylvania Rules of Criminal Procedure Rule 500(A)(1). The court directed the preservation of Officer Snyder's testimony because he would have been unavailable on the day when the testimony would have been useful and, given the perceived exceptional circumstances then existing, the deposition procedure was appropriate. We now believe that the preservation of Officer Snyder's testimony by deposition was an error; nevertheless, Howard is not entitled to a new trial because the admission of Officer Snyder's testimony was harmless error.

Following the institution of a criminal proceeding, a court is authorized to order the taking and preservation of a witness's testimony if that witness may be unavailable for trial or

when, due to exceptional circumstances, the interests of justice require. Pa.R.Crim.P. 500(A)(1). At the time of trial, we believed that there existed exceptional circumstances that required the preservation of Officer Snyder's testimony because he was not going to be available after December 12, 2005. The criminal complaint in this matter was filed on March 4, 2004. Various pre-trial conferences had been held, and the trial had been scheduled to start December 12, 2005. Officer Snyder, a member of the Williamsport Bureau of Police, was present during the trial on December 12, 2005, but had been scheduled to attend a training seminar during the next four days. Officer Snyder's testimony as to statements Howard made to him on the day of the incident would only have been admissible to impeach Howard once he had testified; therefore, Officer Snyder would not have the opportunity to testify until after the presentation of Howard's testimony, which did not occur until December 14, 2005.

On December 14, 2005, the deposition testimony of Officer Snyder was read to the jury. At trial, Howard objected to the admission of Officer Snyder's deposition testimony on the basis that Officer Snyder was not unavailable and could have testified at trial.

**1. Officer Snyder was not Unavailable as a Witness nor were there Exceptional Circumstances to Justify the Deposition.**

Officer Snyder was not unavailable as a witness. The court erred in finding that sufficient evidence had been presented to establish a good faith effort on the part of the Commonwealth to secure Officer Snyder's presence at trial. A witness will not be deemed unavailable upon a mere assertion of such by the proponent of the witness; rather, the proponent must establish the efforts it took to secure the witness's attendance at the proceeding. *Conrail v. Delaware River Port Auth.*, 880 A.2d 628, 630 (Pa. Super. 2005), *app. denied*, 898 A.2d 1071 (Pa. 2006). Proof of the efforts expended to secure the witness's presence is

necessary to qualify the witness as unavailable. *Id.* at 631. The proponent of the witness must present evidence sufficient to demonstrate a good faith effort to locate the witness and have him present at the proceeding. *Commonwealth v. Lebo*, 795 A.2d 987, 991 (Pa. Super. 2002).

The evidence presented at trial was not sufficient to establish a good faith effort by the Commonwealth to secure Officer Snyder's presence at trial. On December 12, 2005, the Commonwealth informed the court that Officer Snyder would not be available to testify during the trial because he would be out of state attending a four day course on fingerprinting. N.T., 164, 176 (12/12/05). This statement by the Commonwealth was all that was presented as to the unavailability of Officer Snyder. According to *Commonwealth v. Lebo, supra*, this is insufficient to establish a good faith effort.

In *Lebo*, the Pennsylvania Superior Court held that the trial court erred in finding that the Commonwealth had made a good faith effort to locate and have present a witness based upon the Commonwealth's assertion that the witness was at basic training in the military. 795 A.2d at 990. On the day of trial, the Commonwealth informed the trial court that it had learned two days before that one of its witnesses was in boot camp and would not be available because she had two more weeks of training. *Id.* at 990-91. The Commonwealth did not present any information to the trial court that it had subpoenaed this witness. *Id.* at 991. Based upon the Commonwealth's mere assertion to the trial court, the Superior Court said, "Without more, we cannot conclude that the Commonwealth made a good faith effort to locate [the witness] and have her present for trial." *Ibid.*

As was the case in *Lebo*, the only evidence regarding the effort by the Commonwealth to secure Officer Snyder's presence at trial was the assertion by the Commonwealth that he

would be unavailable. The court does not doubt the veracity of the Commonwealth's assertion that Officer Snyder was going to be away at training. However, the mere assertion alone was not sufficient to establish a good faith effort. The Commonwealth could have subpoenaed Officer Snyder on December 12, 2005 to require him to be in court on December 14, 2005 if need be.

Also, the scheduled training seminar for Officer Snyder cannot be said to have made him unavailable for trial under the facts of this case. There was no testimony that the training would not be available on another date. There was no testimony that Officer Snyder's career would be jeopardized nor that the Williamsport Police Department would be unduly prejudiced if Officer Snyder did not go to the training. There was no testimony that the Williamsport Police Department could not have sent another officer in Officer Snyder's place. The court acknowledges that police training seminars are important, but there was no evidence to support the conclusion that this particular seminar was so significant as to outweigh Howard's right to require Officer Snyder to testify in person before the jury. Accordingly, the Commonwealth failed to establish a good faith effort; therefore, the court erred in finding that Officer Snyder was unavailable.

Exceptional circumstances did not exist to justify the deposition. The court considered the possibility that the trial could be continued to a subsequent trial term to allow Officer Snyder to appear as a witness. The court did not grant a continuance because of the large number of witnesses, including a physician, the Commonwealth had subpoenaed and assembled to testify. In addition, defense counsel, who was from out of town and who had a

busy trial schedule before other courts, had long been attached for the December trial dates and the defense had also subpoenaed several out of town witnesses for these dates.

It would not have been fair to Howard to grant a continuance of the trial until Officer Snyder would be available to testify as Howard had waited almost two years for his day in court. The unfairness is underscored by the ease with which the conflict regarding Officer Snyder's schedule could have been avoided. The Commonwealth knew from the time of Howard's arrest that Officer Snyder would likely be a witness at trial. Although no evidence was presented as to when Officer Snyder was enrolled in the training course, it is very unlikely that it occurred on the eve of trial. Thus, the fact that Officer Snyder would be attending the fingerprinting course in December would have been known in advance of trial. Despite this, the unavailability of Officer Snyder was never raised as an issue during any of the pre-trial conferences, and consequently, no actions were taken to address this issue. All of the factors, including those we discussed illustrating that Officer Snyder was not unavailable, demonstrate that the Commonwealth had the opportunity to avoid the conflict between trial and Officer Snyder's attendant at the training course; therefore, there were no exceptional circumstances.

Accordingly, the court erred in permitting the taking of Officer Snyder's deposition testimony.

## **2. Admission of Officer Snyder's Deposition Testimony was Harmless Error**

Despite the court's error in permitting the deposition of Officer Snyder, the admission of his deposition testimony was harmless error. An error is harmless if it can be established beyond a reasonable doubt that there is no reasonable probability that the error could have

contributed to the verdict. *Commonwealth v. Mitchell*, 839 A.2d 202, 214 (Pa. 2003); *Commonwealth v. Overby*, 809 A.2d 295, 306 (Pa. 2002). Harmless error exists if:

(1) the error did not prejudice the defendant or the prejudice was *de minimis*;

(2) the erroneously admitted evidence was merely cumulative of the untainted evidence which was substantially similar to the erroneously admitted evidence; or

(3) the properly admitted and uncontroverted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant that the evidence could not have contributed to the verdict.

*Gray*, 867 A.2d at 571-72; *Commonwealth v. Passmore*, 857 A.2d 697, 711 (Pa. Super. 2004), *app. denied*, 868 A.2d 1199 (Pa. 2005). The Commonwealth bears the burden of establishing that the error was harmless. *Mitchell*, 839 A.2d at 214; *Overby*, 809 A.2d at 306.

Officer Snyder's deposition testimony provided a third version of the events that took place in the early morning hours of February 20, 2004. Officer Snyder testified that Howard told him that he arrived at Young's apartment and found Ware inside. N.T., 50, 60 (12/14/05). Officer Snyder testified that Howard said he and Ware became engaged in a struggle. *Id.* at 53, 61, 64. According to Officer Snyder, Howard stated that during the struggle Ware attempted to grab his handgun, which was holstered. *Id.* at 54. Officer Snyder testified that Howard said he and Ware struggled for control of the handgun and it fired striking Ware in the side. *Id.* at 56, 62.

Officer Snyder's deposition testimony did not prejudice Howard. First, while the version of events provided by Officer Snyder's testimony does not mirror Howard's version, the two are not that different. In both versions, Howard and Ware were engaged in a struggle



for control of the handgun. In both versions, the handgun fired wounding Ware in the side as Howard and Ware struggled for control of the handgun. These consistencies would tend to give credence to Howard's version of events.

Second, the version of events that Officer Snyder testified to likely would have provided Howard with a better chance of establishing his claim of self-defense. In that version, Howard and Ware were engaged in a struggle. In this wrestling match, the danger to Howard would have been bodily injury.<sup>2</sup> By grappling with Ware, Howard would have been using proportional force to meet Ware's aggression; therefore, his use of force would have been reasonable and justified. It would have been during this reasonable use of force that Ware grabbed the handgun and the struggle for control ensued. Thus, Ware would have been accidentally shot while Howard was justifiably defending himself against Ware's aggression. As such, Howard would have been able to establish a valid claim of self-defense.

However, Howard's trial testimony contradicted this version. He made no mention of the fact that he and Ware were engaged in a struggle during which Ware tried to grab his sidearm. Howard testified that Ware charged him and kicked him causing him to fall to the ground. Howard testified that while he was on the ground Ware was coming toward him and he struck Ware in the face with the handgun to prevent him from getting on top of him. After this, Howard testified that he was able to stand up. Howard then testified that Ware started to move toward him again and he pointed the handgun at Ware and told him to back away. As stated earlier the pointing of the handgun at Ware was an unjustified use of deadly force. In the end, it was Howard's testimony that prejudiced his self-defense claim, not Officer Snyder's

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<sup>2</sup> Bodily injury is "[i]mpairment of physical condition or substantial pain." 18 Pa.C.S.A. § 2301.

deposition testimony. Accordingly, the admission at trial of Officer Snyder's deposition testimony was harmless error.

### **C. Howard's Challenge to the Severity of His Sentence**

Howard asserts that the court abused its discretion by imposing a sentence of sixty-six months to twelve years incarceration followed by three years of probation because it failed to appropriately consider Howard's lack of a prior criminal record and his twenty years of service as a police officer within this Commonwealth. Stated another way, Howard is asserting that the sentence is excessive in light of the fact that he has no prior criminal record and he has served this Commonwealth for twenty years as a police officer. A claim that a sentence is harsh and excessive is a challenge to the discretionary aspects of the sentence. *See, Commonwealth v. Bailey*, 818 A.2d 543, 544 (Pa. Super. 2003), *app. denied*, 836 A.2d 121 (Pa. 2003); *Commonwealth v. Titus*, 816 A.2d 251, 254 (Pa. Super. 2003). Since Howard is challenging the discretionary aspects of his sentence, his claim will be subject to the rules governing such a challenge.

Issues challenging the discretionary aspects of a sentence must be raised in a post-sentence motion or at the sentencing proceeding. *Commonwealth v. McAfee*, 849 A.2d 270, 275 (Pa. Super. 2004); *Commonwealth v. Manson*, 820 A.2d 788, 794 (Pa. Super. 2003), *app. denied*, 831 A.2d 599 (Pa. Super. 2003). Failure to do so waives an objection to the discretionary aspects of a sentence. *McAfee*, 849 A.2d at 275; *Manson*, 820 A.2d at 794. However, an objection to the discretionary aspects of a sentence will not be deemed waived for failure to raise it in a post-sentence motion if the court failed to advise the defendant at the

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sentencing proceeding of his right to file post-sentence motions. *Commonwealth v. Malovich*, 903 A.2d 1247, 1252 (Pa. Super. 2006). The failure to raise an issue regarding the discretionary aspects of a sentence in a post-sentence motion or at the sentencing proceeding cannot be cured by raising the issue in a Pennsylvania Rules of Appellate Procedure Rule 1925(b) concise statement of matters complained of on appeal. *McAfee*, 849 A.2d at 275.

Howard has waived his challenge to the discretionary aspects of the sentence based upon the court's alleged failure to consider his lack of a prior criminal record and his service as a police officer. First, Howard failed to assert at the April 28, 2006 sentencing hearing that the sentence was harsh or excessive. Howard presented evidence establishing that he did not have a prior criminal record and of his exemplary record as a transit police officer with S.E.P.T.A. and as a member of the Philadelphia Police Department. N.T., 9, 11, 12, 13 (3/8/06); N.T., 4, 14, 27 (4/28/06). However, Howard made no objection following the imposition of the sentence on the basis that the court failed to properly consider this evidence in imposing sentence. Second, Howard failed to preserve the claim by raising it in a post-sentence motion. The record indicates that Howard did not file any post-sentence motions after he was sentenced on April 28, 2006. The record also indicates that the Court advised Howard of his right to file post-sentence motions at the April 28, 2006 sentencing hearing. N.T., 34 (4/28/06). Accordingly, Howard's challenge to the discretionary aspects of his sentence has been waived and cannot be addressed on appeal.

#### **IV. CONCLUSION**

The April 28, 2006 sentence should be affirmed and the appeal denied.

BY THE COURT,

William S. Kieser, Judge

cc: William J. Miele, Esquire  
DA (KO)  
Judges  
Christian Kalas, Esquire  
Gary L. Weber, Esquire (Lycoming Reporter)