IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	**:**	**No. CR-1459-2011**
	:	
v.	**:**	
	:	**CRIMINAL DIVISION**
ROGER MITCHELL RIERA,	**:**	
Defendant	**:**	

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

Following a jury trial from August 13, 2012 to August 17, 2012, Roger Mitchell Riera (Defendant) was convicted of Murder of the Third Degree, a felony of the first degree;[1] Voluntary Manslaughter, a felony of the first degree;[2] and Aggravated Assault, a felony of the first degree.[3] On October 28, 2012, the Defendant filed a Post-Verdict Motion for Arrest of Judgment, which this Court denied following a hearing on October 22, 2012. On November 27, 2012, this Court sentenced the Defendant to fifteen (15) to thirty (30) years in a State Correctional Institution with a consecutive five (5) years of probation with the Pennsylvania Board of Probation and Parole.

On December 3, 2012, the Defendant filed a Post-Sentence Motion. On April 1, 2013, the Defendant filed a Notice of Appeal to the Superior Court of Pennsylvania. On April 2, 2013, this Court denied the Defendant's Post-Sentence Motion in an Opinion and Order, which also summarized the testimony presented at trial. The next day, the Defendant filed a Praecipe to Discontinue the Notice of Appeal filed on April 1, 2013 and filed another timely Notice of Appeal.

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[1] 18 Pa.C.S. § 2502(c).
[2] 18 Pa.C.S. § 2503(b).
[3] 18 Pa.C.S. § 2702(a)(1).

On April 10, 2013, the Court ordered the Defendant to file a concise statement of the matters complained of on appeal in accordance with Pa.R.A.P. 1925(b)(1). On April 12, 2013, the Defendant alleged thirteen (13) issues: 1) the guilty verdict was based on insufficient evidence; 2) the guilty verdict was against the weight of the evidence; 3) the trial court erred by denying a motion for a speedy trial; 4) the trial court erred in denying the motions in arrest of judgment; 5) the trial court erred by precluding the defense from mentioning the Castle Doctrine in the opening statements; 6) the trial court erred when denying the Castle Doctrine when charging the jury; 7) the trial court erred in refusing to give jury instructions under the Castle Doctrine; 8) the trial court erred in not permitting the defense to use a taped interview of the defendant at the police station; 9) the trial court erred by permitting a cell phone video of the victim dying as evidence; 10) the trial court erred by now allowing defense testimony that the victim carried a knife; 11) the trial court erred by denying to give jury instructions for involuntary manslaughter; 12) the trial court erred by not vacating the verdicts which were inconsistent; and 13) that the Defendant's sentence was excessive and contrary to the fundamental norms of the sentencing process.

On April 29, 2013, the Defendant retained Eric Winter, Esq. to represent him on direct appeal to the Superior Court. Attorney Winter filed an Entry of Appearance, Petition to substitute Appearance as Counsel and Waiver of Time to File Opinion, and Petition to Extend Time and to Amend Concise Statement of Matters Complained of on Appeal. On May 1, 2013, this Court allowed Attorney Winter to enter his appearance and granted him an additional thirty (30) days to file an amended concise statement. On May 31, 2013, Attorney Winter filed an Amended Concise Statement of Matters Complained of on Appeal, which alleged twelve (12) issues: 1) whether the evidence was sufficient to support the verdicts of guilt; 2) whether the

verdicts were against the weight of the evidence; 3) whether the trial court erred in denying Defendant's motion to dismiss pursuant to Pa.R.Crim.P. 600; 4) whether the trial court erred in precluding the Defendant from arguing the castle doctrine; 5) whether the trial court erred in not instructing the jury as to the castle doctrine; 6) whether the trial court erred in not permitting the Defendant to use his prior taped statement to police; 7) whether the trial court erred in permitting a cell phone video of the victim shortly after the shooting; 8) whether the trial court erred in precluding evidence that the victim carried a knife; 9) whether the trial court erred in not allowing the jury to consider Involuntary Manslaughter or Voluntary Manslaughter; 10) whether the Defendant's sentence was excessive and contrary to fundamental norms; 11) whether the Commonwealth erred in failing to provide discovery on Fletcher's changed statement to police and whether the trial court took no action to protect the Defendant's rights; and 12) whether the Commonwealth committed prosecutorial misconduct in incorrectly stating facts and law in its closing argument.

Whether the trial court erred in not dismissing the Defendant's case pursuant to Pa.R.Crim.P. 600

The Defendant alleges that this Court erred in denying a motion for speedy trial pursuant to Pa.R.Crim.P 600. First, the Court is unaware of a motion for speedy trial in this case. In addition, the court file and the docket statements do not show that a motion for speedy trial was ever filed. This Court, however, will still address whether the Defendant's case should have been dismissed pursuant to Pa.R.Crim.P. 600.

"[T]rial in a court case in which a written complaint is filed against the defendant shall commence within 365 days from the date on which the complaint is filed." Pa.R.Crim.P. 600(A)(2)(a). "Trial shall be deemed to commence on the date the trial judge calls the case to

trial . . . ." Pa.R.Crim.P. 600(A)(1). In determining when the trial should commence, only periods of delay caused by the defendant shall be excluded from the computation of the length of time of any pretrial incarceration. Pa.R.Crim.P. 600(C)(2). "[A] Trial court must grant a Rule 600(G) motion to dismiss unless it finds that the Commonwealth has exercised due diligence and that the circumstances occasioning the postponement were beyond its control." Commonwealth v. Meadius, 870 A.2 802, 805 (Pa. 2005) (citing Pa.R.Crim.P. 600(G)). The exercise of "due diligence" requires the Commonwealth to do everything reasonable within its power to guarantee that a trial begins on time. See id. at 807-08.

In this case, the Defendant requested continuances that delayed the trial. On September 18, 2011, the Defendant shot and killed Andrew Gula. The Criminal Complaint against the Defendant was filed on the same day. On November 14, 2011, the Court granted the Defendant's motion for a continuance of the pre-trial status conference till January 20, 2012 and for the criminal pre-trial conference to be continued to January 31, 2012. On December 12, 2011, the Court granted the Defendant's Motion to Extend Time to File Omnibus Pre-trial Motion, which stated that the sixty (60) day extension would be excludable for Rule 600 purposes. In addition, on January 31, 2012, the Defendant continued his criminal pre-trial conference to March 20, 2012.

Even if the Court disregards excludable time, the trial began within 365 days of the Criminal Complaint being filed, specifically on the 330th day. On April 12, 2012, the Court issued an Order scheduling jury selection for August 1, 2012 and for the trial to commence on August 13, 2012. The Defendant's trial commenced and finished within 365 days of the criminal

complaint being filed.[4] Even if the Defendant filed a motion for speedy trial pursuant to Pa.R.Crim.P 600 it would have been without merit and should have been denied.

Whether the Commonwealth erred in failing to provide discovery on Fletcher's changed statement to police and whether the trial court took no action to protect the Defendant's rights

The Defendant argues that the Commonwealth erred in failing to provide a changed statement made by Fletcher to police. Following the shooting, Fletcher had told police that the Defendant told the victim before shooting "get the f*** away from me," "get away from me," and/or "don't touch me." During trial, Fletcher testified that the Defendant told the victim "I told you I would f***in kill you," which defense counsel objected to following his testimony and the testimony of Yeagle. Defense counsel argued that they had not received this testimony in discovery. Outside the presence of the jury, Dincher testified that Fletcher changed his statement in June but that he still was not certain what the Defendant had stated. Due to the uncertainty of Fletcher, neither Dincher nor any other officer from the Williamsport Bureau of Police made a report of the new statement. The Commonwealth did learn of the statement leading up to trial.

In response to Brady v. Maryland, 373 U.S. 83 (1963), the Pennsylvania Rules of Criminal Procedure outlines mandatory discovery:

> (a) Any evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth.
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> (b) Any written confession or inculpatory statement, or the substance of any oral confession or inculpaotyr statement, and the identity of the person to whom the confession or inculpaotry statement was made that is in the possession or control of the attorney for the commonwealth;

Pa.R.Crim.P. 573(B)(1)(a). Further, the Rules of Procedure states evidence that is discretionary with the court, which includes "all written or recorded statements, and substantially verbatim

[4] The jury rendered its verdict on August 16, 2012.

oral statements, of eyewitnesses the Commonwealth intends to call at trial." Pa.R.Crim.P. 573(A)(B)(2).

Whether the evidence is exculpatory or inculpatory determines the legal analysis. In Sullivan, a police officer testified at trial that the Defendant stated to police "he cocked the hammer" of a revolver before it went off and killed the victim. Commonwealth v. Sullivan, 820 A.2d 795, 801 (Pa. Super. 2003). The statement had not been disclosed to the Defendant during discovery. Id. The Superior Court found that the statement was inculpatory and therefore Brady did not apply. Id. at 804. The Superior Court, however, applied Pa.R.Crim.P 573(B)(1)(b) and found that for the Commonwealth to have to give the discovery to the Defendant it must have been "within the possession or control of the attorney for the Commonwealth." Id. In that case, "[t]he Commonwealth was not in possession of the disputed statement, therefore the prosecution had no obligation to provide it to the defense." Id.

Here, the testimony of Fletcher was inculpatory and therefore Brady is not applicable. Because the statement was inculpatory the Commonwealth would have only been required to supply the statement to the Defendant if they were in possession or control of it, pursuant to either Pa.R.Crim.P. 573(B)(1)(b) or Pa.R.Crim.P. 573(B)(1)(2)(a)(ii). Dincher testified that no report was ever generated and so the Commonwealth was never in possession of the statement to give to the Defendant.

Further, the Defendant was not prejudiced by Fletcher's statement. The Court directed Fletcher to attend Court the next day in case defense counsel wanted to re-call him to the stand. In addition, Dincher was re-called to testify and impeached Fletcher's testimony at trial. Dincher recounted how Fletcher changed his statement about what the Defendant stated immediately

before the shooting and how he was uncertain. The Court finds that the Defendant's issue is without merit and that he is not entitled to relief.

Whether the Commonwealth committed prosecutorial misconduct in incorrectly stating facts and law in its closing argument

The Defendant alleges prosecutorial misconduct during the closing argument. "Generally, comments by the District Attorney do not constitute reversible error unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility towards the defendant so that they could not weigh the evidence objectively and render a true verdict." Commonwealth v. Sampson, 900 A.2d 887 (Pa. Super. 2006) (citing Commonwealth v. Correa, 664 A.2d 607, 609 (Pa. Super. 1995).

The Defendant has not specified what facts or law were incorrectly stated during the closing argument. After a review of the record, the Court is unable to determine any facts that were misstated or objected to by defense counsel. The record does show that defense counsel objected to the Commonwealth's definition of malice. The Commonwealth stated that there were four (4) ways to infer malice in this case:

> COMMONWEALTH: [Y]ou may infer malice simply because the Defendant used a deadly weapon on a vital part of the [victim's] body. . . . You can infer malice because the Defendant did an action disregarding the fact that he was going to kill someone. . . . you could infer based upon the testimony alone that the Defendant did not actually believe he was in fear of death, that he was not in the kill or be killed situation. Lastly, you can find malice because he could have retreated safely. . . . You only need to find one thing that the Defendant did to find that he did this killing with malice and I just gave you four. The Defendant is guilty of third degree murder beyond a reasonable doubt.

Defense counsel objected that this was a misstatement of law because only the use of a deadly weapon on a vital part of the victim can infer malice. The three other facts can be used to find malice but not to infer malice.

The Court agreed with defense counsel that the Commonwealth misstated the law. N.T., August 16, 2012, p. 40. The fact that the Defendant did an action disregarding that he was going to kill someone, that he did not believe he was in a kill or be killed situation, or that he could have retreated may have been used by the jury to find malice, but not to infer it on their own.

Defense counsel requested that the Court correct the definition of malice in the jury instruction. Id. at 37. Defense counsel stated on the record that they did not object when the Commonwealth initially made the statement because they thought the Commonwealth was nearly done with their closing and that the Court could correct the misstatement during jury instructions. Id. The Court agreed to clarify that the law stated in the closing arguments was not binding and that only the law recited by the Court could be used to find the Defendant guilty:

> COURT: Let me remind you before I get into the elements of the offenses that both attorneys in their closing arguments have given you an indication or kind of a preview as to what the law will be with regard to the elements of those offenses. No disrespect to either attorney in their closing arguments, but I am ultimately the determiner of the law that you need to use in applying to decide whether or not the Commonwealth has met its burden of proof. So to the extent that my instruction on the law differs from what you may recall them stating I overrule them. And again, as I think I indicated to you the elements of the offenses of the three charges for which you'll have under consideration, the third degree murder, voluntary manslaughter and aggravated assault as well as the defense of justification, those instructions will be sent out with you and, in fact, what we'll do is we'll make one copy for each of you so that way you don't have to share one version you can have your own copy so that that will help you with the discussion in your determination.

Id. at 48. As requested by defense counsel, the Court clarified that the jurors were to follow the Court's jury instruction. In addition, the Court gave the jury copies of the instruction for third degree murder, voluntary manslaughter, and aggravated assault. The Court believes that any prejudice that resulted from the misstatement of law was corrected by the Court's clarification.

Remaining issues raised by the Defendant's Concise Statement

For the remaining issues raised by the Defendant, the Court will rely on its Opinion and Order dated April 2, 2013, which denied the Defendant's Post Sentence Motion.

DATE: _____ By the Court,

Nancy L. Butts, President Judge

xc: Aaron Biichle, Esq.
Ken Osokow, Esq.
Eric Winter, Esq.
Prince Law Offices
646 Lenape Road
Bechtelsville, PA 19505